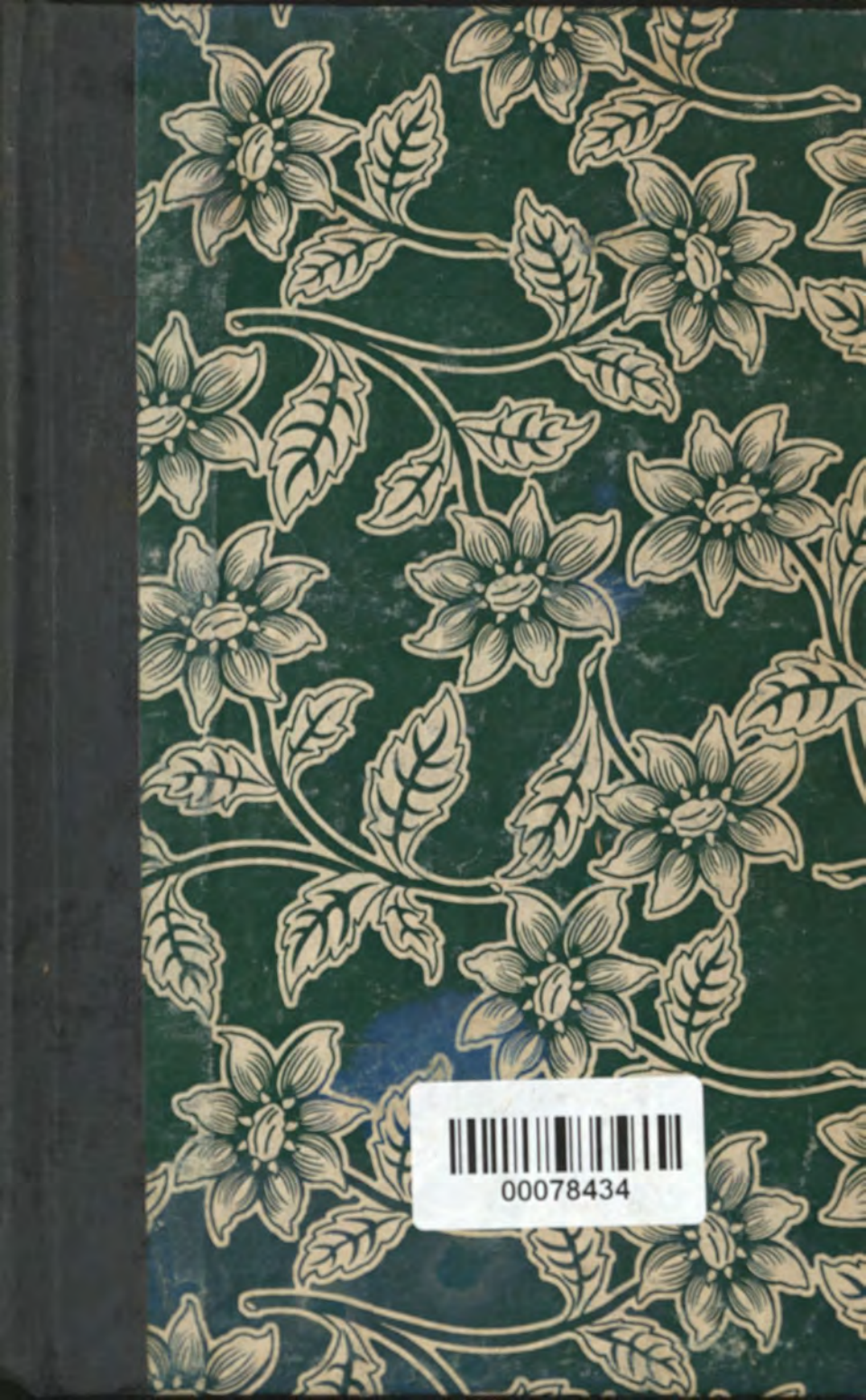
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A

TREATISE

OF

EQUITY.

WITH

THE ADDITION OF

MARGINAL REFERENCES AND NOTES,

By JOHN FONBLANQUE, Esq.

BARRISTER AT LAW.

FIFTH EDITION,

CORRECTED, WITH CONSIDERABLE ADDITIONS.

VOL. I.

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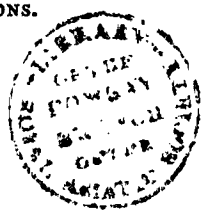

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TO THE

RIGHT HONOURABLE

JOHN LORD ELDON,

LORD HIGH CHANCELLOR OF GREAT BRITAIN,

BY WHOSE APPROBATION

THE EDITOR OF THIS WORK

WAS ORIGINALLY ENCOURAGED TO SUBMIT IT TO THE PUBLIC;

THIS, THE FIFTH EDITION,

MATERIALLY, AS THE EDITOR TRUSTS, IMPROVED BY HIS LORDSHIP'S MOST PROFOUND AND LUMINOUS JUDGMENTS,

IS,

MOST RESPECTFULLY INSCRIBED,

BY

HIS LORDSHIP'S

MOST OBLIGED AND GRATEFUL SERVANT,

JOHN FONBLANQUE.

Middle Temple,
January 1820.

PREFACE

TO THE

SECOND EDITION.

SINCE the publication of the last Edition of this Treatise, I have been kindly favoured with some of the Manuscripts of the late HENRY BALLOW, Esq. which, with his library, he bequeathed to the late EARL of CAMDEN. One of the Manuscripts contains a very large portion of the Treatise of Equity, revised and corrected apparently for the purpose of publication; a circumstance which, though it may not remove all doubt of Mr. BALLOW's having been the author of the work, must considerably strengthen the opinion which has generally prevailed that he was.

Mr. BALLOW appears, from the admissions to the Bar by the Honourable Society of Lincoln's-Inn, to have been called in Michaelmas Term 1728. What was his then age, or what had been his previous course of education and

the Author, he shall be happy in the opportunity of communicating such information, and of accompanying it with such other particulars as he may be able to collect concerning him. The Editor has also refrained from adverting to the nature of the subject of the work, as every intelligent mind must be sensible of its importance, though the most enlightened and enlarged is scarcely equal to the duly expatiating upon it.

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A

TREATISE OF EQUITY.

BOOK THE FIRST.

CHAP. I.

Of the Nature of Equity.

SECTION I.

It is plain that law is a moral science (*a*), since the end of all law is justice; and justice, in the most extensive sense of the word, differs little from virtue itself, for it includes within it the whole circle of virtue. Yet the common distinction between

(*a*) Law, in its largest and most comprehensive sense, may with great propriety rank as a moral science; but in its more limited and usual acceptation, as applying to the laws of any particular country, it would be

them is, that the same, which, considered positively and in itself, is called virtue, when considered relatively and with respect to others, has the name of justice (*b*). But justice, in a proper and

difficult to establish its claim to such distinction. For legal obligations being from their nature more circumscribed than moral duties, there are many moral claims (beneficence, gratitude, charity, &c.) which the law does not enforce, and many violations of morality which it does neither punish nor restrain.

A further objection to its claim to rank as a moral science, may be drawn from the contrariety which appears to prevail in the laws of different countries, and from the changes which have from time to time taken place in the laws of every country; whereas a moral science must be founded on the immutable dictates of reason, uniform in its object, and as uniform in the means employed for its attainment.

(*b*) Puffendorff divides justice into universal or imperfect, and particular or perfect. The first, he conceives to be the discharge of every duty, though the same be not exacted by force or rigour of the law; the latter, he defines to be the merely doing that which may be strictly demanded of us. Law of Nature and Nations, b. 1. c. 7. s. 89. Elementorum Jurisprudentiæ universalis, lib. 1. definitio 17. 3. 1. Multis enim casibus evenit ut obligatio sit in nobis et nullum jus in alio. Gro. Lib. 2. c. 11. s. 3. See also Lord Bacon's readings on the Statute of Uses, 306; and Pothier Traité des Obligations, article preliminaire.

limited sense, as being itself a part of virtue, is confined to things simply good or evil, and consists in a man's taking such a proportion of them as he ought; and this is usually divided into two sorts: the one distributive of things to be divided amongst those who are to be united in civil society; the other commutative, or that which governs contracts (1). The reason of this difference is, that, in the one, respect is had of the persons; but in the other, only of the damage done. For it is the office and duty of a judge to make an equality between the parties, that no one may be gainer by another's loss; but, in distributive justice, the same equality is required of both: that neither equal persons have unequal things, or unequal persons things equal.

(1) Puffendorff's Law of Nature and Nations, b. 1. c. 7. s. 12.

SECTION II.

But our present inquiry is restrained to that first sort of justice which governs contracts; for, as an action or suit, the remedy the law hath provided for obtaining justice, is but a legal demand of some right,

and all civil rights must arise from obligations, and these obligations are founded on compacts (1); it follows, of necessity, that the proper subject of law is contracts, and that justice is the chief end of law which teaches the performance of them. Now contracts are either voluntary or involuntary (2). The voluntary are buying and selling, letting and hiring, deposits and interest of money, and the like; the involuntary, are theft, murder, rapine, and all other heinous offences, whether secret or violent. But we shall waive the treating of these any further here, since it is the voluntary contracts only that we shall have occasion to consider, and such especially as are most in use amongst us: for of torts (*c*) and crimes, Chancery has no proper jurisdiction (*d*). And we do

(1) Bracton de Actionibus, 98, ib. 89. a.

(2) Puffendorff's Law of Nature and Nations, b. 1. c. 7. s. 11. Vinnius, 593.

(*c*) That courts of equity have jurisdiction in matters of waste, and also in some cases of trespass, see b. 1. c. 1. s. 5. n. (p).

(*d*) "The freedom of our constitution will not "permit that, in criminal cases, a power should be "lodged in any judge to construe the law otherwise "than according to the letter. This caution, while "it admirably protects the public liberty, can never "bear hard upon individuals. A man cannot suffer "more punishment than the law assigns, but he may

not mean to confine ourselves to the municipal laws only, but to have chiefly in view that natural justice and equity, which ought to be the ground-work and foundation of all laws, and which corrects and controls them when they do amiss (*e*).

" suffer less. The laws cannot be strained by par-
" tiality to inflict a penalty beyond what the letter will
" warrant; but in cases, where the letter induces any
" apparent hardship, the Crown has the power to
" pardon." 1 Blackstone's Com. Introd. s. 3.

And as courts of equity cannot take cognizance of criminal matters, neither have they, " originally and " strictly, any restraining power over criminal pro-" secutions. But where a bill is brought to quiet " possession, if, after that, the plaintiff prefers an in-" dictment for a forcible entry, which is of a double " nature, as it partakes of a breach of the peace and is " also a civil right, the court in which the suit is " instituted may stop the proceedings upon such indict-" ment, for when parties submit their right to the court, " they have certainly a jurisdiction, and may interpose." Per Lord Hardwicke, the *Mayor and Corporation of York* v. *Sir Lionel Pilkington*, 2 Atk. 302.

(*e*) In every well-constituted government, there is somewhere lodged the power of supplying that which is defective, and controlling that which is unintentionally harsh in the application of any general rule to a particular case. This power, however, must not be considered as a power to make a new law, or to dis-

pense with an established law, the object of which is clearly defined, and its provisions distinctly declared, with reference to all the circumstances which belong to the case. This distinction is anxiously referred to both by Grotius and Puffendorff. The former defines equity to be "Correctrix ejus in quo lex propter "universalitatem deficit;" "fit autem ea correctio "non tollendo legis obligationem sed, declarando "legem in certo casu non obligare." Grotius de Equitate, s. 12. Whereas he defines the power of dispensing with the law, "Virtus voluntatis in eo qui "potestatem habet ad tollendam legis obligationem "in personis, rebus, aut factis, particularibus aut "singularibus, quatenus id fieri potest sine imminu-"tione justitiæ aut publicæ utilitatis." "Differt hæc "multum ab equitate, hæc enim obligationem tollit, "equitas vero nullam esse legis obligationem declarat." Grotius de Indulgentiâ, s. 1. 4. Puffendorff having defined equity, "Ut prudenter declaretur casum aliquem "peculiaribus vestitum circumstantiis a legislatore sub "generali lege non fuisse comprehensum;" proceeds, "est et alia significatio æquitatis quâ ex equo et bono "disceptantur leges quæ legibus civilibus expresse "non definiuntur sed judici vel arbitro et collatione "juris naturæ aliarumque legum civilium decidendæ "relinquuntur. Dispensatio autem est quando singuli "in certo causu obligatione juris civilis quâ per sum-"mam potestatem solvuntur qui alias tenebantur." Elementorum Jurisprudentiæ universalis, lib. 1. s. 22, 23.

The same distinction seems to have bounded the jurisdiction of the Roman Prætor, who is styled, "Cus-"tos non conditor juris;" "juvare, supplere, inter-"pretari, mitigare, jus civile potuit; mutare vel tollere "non potuit." Digest, lib. 1. tit. 1. 7. Taylor's Civil Law Prætor's Edicts. See also Co. Litt. 24. b.

To fix the precise period of the origin of our courts of equity, the jurisdiction of which is separate and distinct from that of our courts of law, were an inquiry of very considerable difficulty; and it is sufficient that we find them established in the earliest periods of our legal constitution, exercising a jurisdiction, regulated by principles and precedents, in all these cases, which, according to Grotius, "lex non exacte definit, "sed arbitrio boni viri permittit." See Lord Hale's Jurisdiction of the Lords, p. 46. See Jurisdiction of the Court of Chancery, 1 Collectanea Juridica, Bracton, fo. 23 b. The charge which has been frequently made against this jurisdiction, as being an innovation upon the jurisdiction of courts of law, seems to have very little to support it. Sir Rob. Atkyns has brought together the principal objections to the exercise of such a jurisdiction, but though evidently prejudiced, he has been, in the course of his inquiry, compelled by facts to furnish a very sufficient answer to the objections upon which he seems to have relied. Jurisdiction of the Court of Chancery.

But it is not the intention of the editor of this treatise to revive a discussion, from which no real advantage can be derived. They, however, who are disposed to inform themselves, as to the grounds taken by the friends and opponents of the jurisdiction of equity, may gratify their curiosity by consulting the several works referred to by Mr. Hargrave, in his Law Tracts, p. 344.

It may not, however, be improper to observe, that courts of law are, equally with our courts of equity, chargeable with having extended their jurisdiction by the aid of fiction; and that, if courts of equity, professing to proceed upon the grounds of the party being

remediless at law, do take cognizance of some matters, of which courts of law would now take cognizance, they will be found originally to have derived their jurisdiction from the narrow decisions of courts of law; and, having once strictly possessed it, courts of law ought not to be at liberty at pleasure to deprive them of it.

SECTION III.

EQUITY, therefore, as it stands for the whole of natural justice, is more excellent than any human institution; neither are positive laws, even in matters seemingly indifferent, any further binding than they are agreeable to the law of God and nature (1). But the precepts of the natural law, when enforced by the laws of man, are so far from losing any thing of their former excellence, that they thence receive an additional strength and sanction; yet as the rules of the municipal law are finite, and the subject of it infinite, there will often fall out cases which cannot be determined by them; for there can be no finite rule of an infinite matter perfect. So, that there will be a necessity of having recourse to the natural principles, that what was wanting to the finite may be

(1) Bla. Com. Introd. s. 2.

supplied out of that which is infinite (2). And this is properly what is called equity, in opposition to strict law; and seems to bear something of the same proportion to it in the moral, as art does to nature in the material world. For, as the universal laws of matter would, in many instances, prove hurtful to particulars, if art were not to interpose, and direct them aright; so the general precepts of the municipal law would oftentimes not be able to attain their end, if equity did not come in aid of them (*f*).

(2) Grotius de Equitate, s. 5. Republique de Bodin, tom. ii. p. 12.

(*f*) In the preceding section I have attempted to give a general definition of equity; I shall now endeavour to furnish an outline of the jurisdiction of those courts which profess to proceed upon its principles. The jurisdiction exercised by courts of equity may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law.

It is assistant to the jurisdiction of courts of law; 1st, By removing legal impediments to the fair decision of a question depending in courts of law; thus if an ejectment be brought to try a right to land in a court of common law, a court of equity will restrain the party in possession (unless he has an equal claim to the protection of a court of equity) from setting up any title which may prevent the fair trial of the right, as a term for years outstanding in a trustee, lessee, or mortgagee. *Harrison* v. *Southcote*, 1 Atk.

And thus, in Chancery, every particular case stands upon its own particular cir-

540. So also equity will, under circumstances, restrain a party from insisting upon the invalidity of a devise. Anon. 1 Ch. Ca. 267. 2dly, By compelling a discovery which may enable them to decide. See B. 6. 3. 3dly, By perpetuating testimony, when in danger of being lost, before the matter to which it relates can be made the subject of judicial investigation. The *Earl of Suffolk* v. *Green*, 1 Atk. 451. *D. of Dorset* v. *Serjeant Girdler*, Pre. Ch. 531. *Cressett* v. *Mytton*, 3 Bro. Ch. Rep. 481. See *Lord Dursley* v. *Fitzhardings*, 6 Ves. 251; where the principles are fully stated: but query whether this proceeding can be made available as against the Crown. It is, however, material to observe, that a bill to perpetuate testimony will lie, though the plaintiff might proceed at law, if he allege by his bill, and by an affidavit annexed to the bill, any circumstance by means of which the testimony may probably be lost. *Philips* v. *Carew*, 1 P. Wms. 117, as that the witness to be examined is the only witness to a material fact. *Shirley* v. *Ferrers*, 3 P. Wms. 77. *Hankin* v. *Middleditch*, 2 Bro. Ch. R. 641. It may also be said to be assistant, by rendering the judgments of courts of law effective, as 1st, by providing for the safety of property in dispute pending a litigation: in some cases by ordering the property to be brought into court, or to be collected by a receiver: but to induce the court to interfere against a legal claim, a very strong case must be made out, *Lloyd* v. *Passingham*, 16 Ves. 59. As to appointing a receiver where the executor is a bankrupt, see *Howard* v. *Papere* and *Gladdon* v. *Stoneman*, 1 Maddock's Rep. 142. In other cases by restraining the party in whose hands it is from exercising any power

cumstances (3): and although the common law will not decree against the general rule

(3) 2 Ch. Ca. 93.

over it, or parting with it until further order; 2dly, by counteracting fraudulent judgments, &c.; and 3dly, by putting a bound to vexatious and oppressive litigation. As to bills of peace, see *Wake* v. *Conyers*, 1 Eden's R. 331, where the cases are collected and distinguished. As to bills of interpleader, see *Hodges* v. *Smith*, 1 Cox's Rep. 357. *Dawson* v. *Hardcastle*, 1 Cox's Rep. 278, 280. It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition, and dower. It claims an exclusive jurisdiction in most matters of trust and confidence; and "wherever upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is silent."

The established merit of Lord Redesdale's Treatise on the Pleadings in a Suit of Chancery (a work, from which the editor has, in this division, and in many other particulars, drawn very considerable assistance), will of course have rendered its contents too familiar to every practitioner in our courts of equity, to render references to it in general necessary. But, as to his Lordship's concluding observation, see *Gardiner* v. *Edwards*, 5 Ves. 592, in which case Lord Rosslyn is reported to have said, "It is too general a ground to take in support of this writ (*ne exeat regno*) or any other proceeding in this court, that I will act generally to prevent injustice." As to the grounds upon which the court will interfere by writ *ne exeat regno*, see *De Carriere* v. *De Calonne*, 4 Ves. 577. *Roddam* v. *Hetherington*, 5 Ves. 91. *Russell* v. *Asby*, 5 Ves. 96. *Jackson* v. *Petrie*, 10 Ves. 164.

of law, yet Chancery doth, so as the example introduce not a general mischief (*g*).

To pursue this division of the jurisdiction of courts of equity with that minuteness which is necessary to a particular acquaintance with its powers, would lead to an investigation too extensive for the nature of this treatise. It may, however, be expected, that some notice should be taken of the general objection that is urged against the claims of courts of equity to a concurrence of jurisdiction in some cases with courts of law. This concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of suits; for as the mode of proceeding in courts of law requires the plaintiff to establish his case, without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases where the principal facts to be proved by one party are confined to the knowledge of the other party; in such cases, therefore, it becomes necessary for the party wanting such evidence to resort to the extraordinary powers of a court of equity, which will compel the necessary discovery; and, the court having acquired cognizance of the suit, for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons will entertain suits for partition and dower, though discovery be not necessary to the plaintiff's case.

The case (and, I believe, the only case) in which fraud cannot be relieved against in equity, concurrently with courts of law, though discovery be sought, is the

Every matter, therefore, that happens inconsistent with the design of the legislator (*h*),

case of fraud, in obtaining a will, which, if of real estate, since the case of *Kerrick* v. *Bransby*, 3 Brown's Parl. Cases, 358, is constantly referred to a court of law in the shape of an issue devisavit vel non; and which, if of personal estate, is cognizable in the spiritual courts; but see *Wild* v. *Hobson*, 2 Vesey and Beames, p. 108. That courts of equity have a concurrence of jurisdiction with courts of law in all other matters of fraud, and will not lay down rules restrictive of such jurisdiction, but will proceed in every case of fraud upon its particular circumstances, see *Gifford* v. *Ouse*, 27th Feb. 1739. *Ch. White* v. *Hussey*, Pre. Ch. 14. *Hungerford* v. *Earl*, 2 Vernon, 261. *Colt* v. *Woollaston*, 2 P. Wms. 156. *Stent* v. *Baillis*, 2 P. Wms. 220. *Sowerby* v. *Warder*, 2 Cox's R. 268. And it may be material to remark, that though courts of equity cannot set aside a will for fraud, they can convert the person practising the fraud, if he claim benefit under the will, into a trustee (at least to the extent of such benefit,) for the person injured by the fraud. *Marriott* v. *Marriott*, Gilb. Rep. 203. See page 64, Vol. 2. B. 3. Part 1. c. 1, s. 3.

The jurisdiction exercised by courts of equity in matters of account, is, in many cases, bounded by the discovery; as where a suit is instituted for an account of waste of timber, without praying an injunction, the plaintiff cannot have a decree for relief. *Jesus College* v. *Bloome*, 3 Atk. 262. *Piers* v. *Piers*, 1 Ves. 521. But see *Lee* v. *Alston*, 1 Bro. Ch. Rep. 194. 3 Bro. Ch. Rep. 37, in which an account of timber felled was decreed, though an injunction does not appear, from the

or is contrary to natural justice, may find relief here. For no man can be obliged

report of the case, to have been prayed. Where the bill seeks an account of ore dug, the court will decree it, and though the legal remedy be lost by the death of the party. *Bishop of Winchester* v. *Knight*, 1 P. Wms. 406; because the working of a mine is a kind of trade. *Story* v. *Lord Windsor*, 2 Atk. 630. *Marquis of Lansdown* v. *Marchioness of Lansdown*, 1 Maddock's R. p. 116. Yet, even in that case, the plaintiff must show a possession. *Sayer* v. *Pierce*, 1 Ves. 232. Neither will equity, in all cases, decree an account of mesne profits, for "where "a man has title to the possession of lands, and makes "an entry, whereby he becomes entitled to damages at "law for the time that possession was detained from "him, he shall not, after his entry, turn that action at "law into a suit in equity, and bring a bill for an "account of the profits, except in the case of an in-"fant, or some other very particular circumstances." P. Lord Keeper, *Tilley* v. *Bridges*, Pre. Ch. 252. *Owen* v. *Apirce*, 1 Ch. Rep. 17. See *Delver* v. *Hunter*, Bunb. 57. The particular circumstances excepted by the Lord Keeper, in laying down this rule, extend to all those cases, which involve an equity which the plaintiff cannot make available at law. *Coventry* v. *Hall*, 2 Ch. Rep. 134. *Duke of Bolton* v. *Deane*, Pre. Ch. 516. *Dormer* v. *Fortescue*, 3 Atk. 129, 130. *Townsend* v. *Ash*, 3 Atk. 336. *Norton* v. *Frecker*, 1 Atk. 524. See also *Curtis* v. *Curtis*, Rolls, 2 Brown's Rep. Ch. 622. But the account will be confined to the filing of the bill, if fraud or concealment, of some instrument, be not imputable to the defendant. *Pulteney* v. *Warren*, 6 Ves. 73. See 4 Ann. c. 16, as to Tenants in Common. But the interference of courts of equity is peculiarly

to any thing contrary to the law of nature (*i*); and indeed no man in his senses

effective in correcting errors, or detecting fraud in accounts relied upon as stated and settled, by allowing the plaintiff, in the case of specific error alleged and proved, to surcharge and falsify, and in the case of fraud to open the whole account, *Vernon* v. *Vaudy*, 2 Atk. 119. See *Chambers* v. *Goldwin*, 5 Ves. 837. See also *Roberts* v. *Kuffin*, 2 Atk. 112, in which case it was held, that a party who is at liberty to surcharge and falsify is not merely confined to errors in fact, but may take advantage of errors in law. As to the proceeding in an action of account at law, see 1 Bacon's Ab. title Accompt; in analogy to which is the proceeding in equity, except that the account is referred to a master instead of being taken by auditors. *Ex parte Bax*, 2 Ves. 388.

The jurisdiction exercised by our courts of equity, in most cases of accident, presents a very striking instance of their anxiety to prevent innovation on the jurisdiction of courts of law: its interference being generally founded on some circumstance which obstructs the party's relief at law; as where a bond, or other instrument or security, is lost, it will interfere, by compelling a discovery from the defendant, and will relieve upon such discovery; but the plaintiff is not entitled to any relief upon a mere suggestion that the bond, instrument, or security is lost, but is required, for the purpose of relief, to annex to his bill an affidavit to such effect. *Anon.* 3 Atk. 17. Ld. Redesdale's Treatise, 112. And, as a further security against innovation, it must appear, that the loss of the deed or instrument obstructs the plaintiff in seeking relief at

can be presumed willing to oblige another to it (2). But if the law has determined a

(2) 1 Black. Com. Introd. s. 2. Puffendorff's Elementorum Jurisprudentiæ, l. 1, s. 22.

law: for "the loss of a deed," says Lord Hardwicke, "is not always a ground to come into a court of equity "for relief: for if there was no more in the case, al- "though he is entitled to have a discovery of that, "whether lost or not, courts of law admit evidence of "the loss of a deed, proving the existence of it and "its contents, just as a court of equity does. There "are two grounds to come into equity for relief, an- "nexing an affidavit to the bill. First, where the deed "is destroyed or concealed by the defendant; and "whenever that is the case, the plaintiff is entitled to "have relief in this court, upon the reason in Lord Huns- "don's case, Hob. 109. Another is, where the plaintiff "cannot recover at law, without making profert of the "deed in pleading at law." *Whitfield* v. *Fausset*, 1 Ves. 392. *Anon.* 2 Atk. 61.

The judgment of the court of King's Bench, in *Read* v. *Brookman*, 3 Term Reports, 151, seems to have relieved the obligee from the necessity of coming into equity, upon the mere circumstance of the bond or instrument being lost, by allowing him to state such circumstance in his declaration, as a reason for not making profert of it. Upon this decision it may be observed, that when courts of common law assume a concurrence of jurisdiction in cases of lost deeds, to a profert of which the defendant would be entitled, they appear to have forgotten that courts of equity, if a bill be framed for relief, as well as discovery, require an affidavit to be annexed to the bill that the deed alleged to be lost is not in the possession or power of the plaintiff. This precaution prevents an obligee in a

matter with all its circumstances, equity cannot intermeddle (3); and for the Chan-

(3) *Kent* v. *Bridgeman*, 233 Pre. Ch.

bond from enforcing the obligation without risk of being affected by what might appear against him, were it produced. But in a court of law, if the bond contained a condition or indorsement of payment of interest, and the obligee wished to practise a fraud, he need only allege that such bond is lost, and the obligor might be without remedy, though the deed were actually in the possession of the obligee, unless indeed the obligor went into equity to enforce the production of it. This instance is one of those which tends to prove the wisdom of those who, referring to the difference of the mode of proceeding in the judicatures of law and equity have anxiously endeavoured to keep separate and distinct the objects of their respective jurisdiction; and upon this case being cited in Chancery, as furnishing an objection to the plaintiff's suit in equity, he being relievable at law, Lord Thurlow observed, that the court of King's Bench having determined to give relief in a case formerly relievable only in equity, was not a reason for excluding the ancient, peculiar, and at least concurrent jurisdiction of courts of equity. *Atkinson* v. *Leonard*, 3 Bro. Ch. Rep. 218. This concurrence of jurisdiction, as to this kind of accident, may therefore be considered to extend to all cases in which the deed or instrument has been destroyed, or is concealed by the defendant, or has been lost by the plaintiff, though of the contents of such instrument the plaintiff has other evidence of which he might avail himself at law. But where the relief sought in equity is upon the loss of a bill of exchange, or promissory note, the plaintiff must, by his bill, offer to give security, as an indemnity to the defendant, against any demand being

cery to relieve against the express provision of an act of parliament, would be the same as to repeal it (4). Equity, therefore, will

(4) *Cooke* v. *Bampfield*, 1 Ch.Ca. 22. 8. 1 Black. Com. Introd. s. 5.

made upon him in respect of such lost bill or note. *Walmsley* v. *Child*, 1 Ves. 341. As to other species of accident, see c. 5. s. 8.

The jurisdiction exercised by our courts of equity, in matters of partition, is described by a very and justly eminent writer, as "a *new* compulsory mode sprung "up, and now fully established; by which it is usual "upon a bill filed praying a partition, for the court to "issue a commission to various persons, who proceed "without a jury. How far (he continues) this branch "of equitable jurisdiction, so trenching upon the writ "of partition, and wresting from a court of common "law its ancient exclusive jurisdiction over this sub-"ject, might be traced, by examining the ancient "records of the court of Chancery, I know not; but "the earliest instance of a bill of partition I observe "to be noticed, is a case of the 40th Eliz. in Tothill's "Transactions of Chancery, tit. Partition. Accord-"ing to the short report of this case, the court inter-"posed from necessity, in respect of the minority of "one of the parties, the book expressing, that on that "account he could not be made party to a writ of "petition; which reason seems very inaccurate; for, "if Lord Coke is right, that writ doth lie against an "infant, and he shall not have his age in it, and after "judgment, he is bound by the partition." Co. Litt. 171. Hargrave's Co. Litt. 169, b. note 2.

Mr. Hargrave's opinion upon legal subjects is so deservedly entitled to influence the opinion of others,

not interpose in such cases, notwithstanding accident or unavoidable necessity; so that

that I cannot refrain from observing, that a practice, sanctioned by a precedent of so early a date as the 40th Eliz. cannot reasonably be described as a *new* mode; particularly, when it is considered, that there are very few, if any, reports of decisions in equity of an earlier date. The reason assigned by Tothill for this decision is, in the opinion of Lord Coke, insufficient to support it; and it will become still more so, when it is considered, that an infant, when he attains his age, may shew cause against a decree of partition in equity, unless he be plaintiff in the suit. *Lord Brook* v. *Lord and Lady Hereford*, 2 P. Wms. 518. *Tuckfield* v. *Buller*, Ambler, 197; 3 Atk. 627. But though the reason assigned by Tothill fail, the decision is not destitute of principle to support it. Mr. Hargrave proceeds to observe, that "this was, in Lord Coke's time, "probably a rare and unsettled mode of compelling "partition; for, "that in a case in Chancery, (*Drury* "v. *Drury*, 1 Ch. Rep. p. 26. 3d edit.), which was "referred to the judges, on a point of law between "two coparceners, that the judges certified for issuing the writ of partition between them, and that the "court ordered one accordingly; which, he presumes, "would scarcely have been done, if the decree for a "partition, and a commission to make it, had been a "a current and familiar practice."

The case of *Drury* v. *Drury* appears to have been decided in the sixth of Charles the first: previous to which period, and even to the 40th of *Eliz.*, equity had decreed an equal partition, where that made by the parties appeared to be unequal. *Norse* v. *Ludlow*,

infants had been bound by the statute of limitations, if there had been no exception

32 Eliz. Toth. 155.—Whether this partition was made by writ, commission, or consent, does not indeed appear; neither does it appear in *Drury* v. *Drury*, upon what ground the writ of partition was decreed; but it is observable, in that case, that the question of partition was not referred to the judges, and that if it was, that they could not strictly, in such a case, have certified that a commission, which is an equitable process, ought to issue. The inference, therefore, drawn by Mr. Hargrave from this case, cannot be supported, unless it can be at least shewn, that the judges were called upon to decide not only the question of partition, but also to point out the mode to effect it. If, however, the authority of this case can in any degree support the doubt raised upon it, I think it must be removed by an almost immediately subsequent case, 14 Car. 1. *Babb* v. *Dudeny*, Tothill's Transactions, tit. Partition, f. 155, in which case the court refused to interfere, not upon the ground that it had no jurisdiction, but because "the matter was but 9*l.* per annum." *Norbury* v. *Yarbury*: Toth. ubi supra. See also *Manaton* v. *Squire*, 2 Freeman, 26; in which case partition was considered as cognizable in equity as at law, and *Parker* v. *Gerrard*, Ambl. 236, in which case it is described as matter of right.

To establish the origin of any branch of legal or equitable jurisdiction is always difficult, and seldom necessary, provided the exercise of such jurisdiction is found to be conducive to the ends of substantial justice; and such will appear to be the tendency of the jurisdiction exercised by our courts of equity, in

in the act. And although in matters of apparent equity, as fraud or breach of

cases of partition, upon a reference to the difficulties which obstructed the mode of proceeding at common law: and though, as to freeholds, (*query* as to copyholds) many of those difficulties are removed by the 8th and 9th W. III. c. 31. yet still, if "the titles of "the parties are in any degree complicated, it is ex- "tremely difficult to proceed at law; or where the "tenants in possession are seised of particular estates "only; for the persons entitled in remainder cannot "be bound by the judgment in a writ of partition." Lord Redesdale's Treatise, &c. p. 110. On these considerations, and the almost constant occasion that the parties have for a discovery, is founded this branch of equitable jurisdiction; in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff: for though, at law, it be sufficient to alledge seisin, yet, in equity, the plaintiff must shew his title. *Cartwright* v. *Pulteney*, 2 Atk. 380. But the title may be defeasible. *Wills* v. *Slade*, 6 Ves. 498. And in order to prevent vexatious suits, courts of equity have in some cases of partition refused to allow costs, none being allowed at law on the proceedings by writ. *Metcalf* v. *Beckwith*, 2 P. Wms. 376. *Parker* v. *Gerrard*, Ambl. 236. Ld. Redesdale's Treatise, 111. But see *Calmedy* v. *Calmedy*, 2 Ves. Jun. 568, in which a different practice is stated to have obtained, and in which case the costs of executing the commission, and of the necessary proceedings in the cause, were decreed to be defrayed by the parties in proportion to their interests. See also *Agar* v. *Fairfax*, 17 Ves. 533, in which case the costs were decreed as above stated. *Baring* v. *Nash*, 1 Ves. & B. 551. As to commissions to ascertain boundaries,

trust, precedents are not necessary, yet, in other cases, it is dangerous to extend the

see *Wake* v. *Konyers*, 1 Eden's Rep. 335, in which it was held that to give the court jurisdiction, there must be some question as to the soil itself or danger of a multiplicity of suits.

The jurisdiction of our courts of equity, in matters of dower, for the purpose of assisting the widow with a discovery of the lands or title deeds, or of removing impediments to her rendering her legal title available at law, has never been doubted. But it has been questioned, whether equity could give relief in those cases, in which there appeared to be no obstacle to her legal remedy? *Wallis* v. *Everard*, 3 Ch. Rep. 87. *Wild* v. *Wells*, Dickin's Rep. 3. By the civil law, widows were entitled in the first instance to sue in the council of the emperor, Cod. Lib. 3. Tit. 14. And it seems now, to be settled, that "she labours under so many disadvantages at law, from the embarrassments of trust, terms, &c. that she is fully entitled to every assistance that a court of equity can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained." *Curtis* v. *Curtis*, 2 Brown's Ch. Rep. 634. *Lucas* v. *Calcraft*, there cited; and *Munday* v. *Munday*, 4 Bro. 1. 294. 2 Ves. Jun. 122; and will carry back the account to the death of the husband, unless good cause be shewn why it shall not be so carried back. *Oliver* v. *Richardson*, 9 Ves. 222. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice. *Williams* v. *Lambe*, 3 Bro. Ch. Rep. p. 264. And though the widow should die before she had established her right to dower, equity will, in favour

authority of this court further than the practice of former times (*k*).

of her personal representatives, decree an account of the rents and profits of the lands of which she afterwards appeared dowable; but will not allow interest thereon. *Lindsey* v. *Gibbon*, 1783, cited 3 Cro. Ch. R. 493. *Wakefield* v. *Childs*, 8th July, 1791, MSS.

With respect to the exclusive jurisdiction exercised by our courts of equity, in matters of trust, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this treatise, however, a variety of instances will appear, from which it is hoped the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which at present it may be sufficient to refer.

(*g*) This proposition is neither sanctioned by principle nor authority; for though it may be true that equity has, in many cases, decided differently from courts of law, yet it will be found, upon reference to such cases, that they involved circumstances to which a court of law could not advert, but which, in point of substantial justice, were deserving of particular consideration, and which a court of equity, proceeding on the principles of substantial justice, felt itself bound to respect. The opinion, however, stated by our author, has certainly prevailed; and Sir Joseph Jekyll, in *Cowper* v. *Cowper*, 2 P. Wms. 753, seems to have been particularly anxious to do it away. "Though (says he) "proceedings in equity are said to be secundum dis-

" cretionem boni viri; yet, when it is asked, vir bonus " est quis? the answer is, qui consulta patrum, qui " leges juraque servat. As it is said in Rooke's case, " 5 Rep. 99. b. that discretion is a science, not to act " arbitrarily according to men's will and private affec- " tion: so the discretion which is to be executed here " is to be governed by the rules of law and equity, " which are not to oppose, but each in its turn to be " subservient to the other. This discretion, in some " cases, follows the law implicitly; in others, assists " and advances the remedy; in others, again, it relieves " against the abuse, or allays the rigour of it: but in " no case does it contradict or overturn the grounds " and principles thereof, as has been sometimes igno- " rantly imputed to this court: that is a discretionary " power, which neither this nor any other court, not " even the highest, acting in a judicial capacity, is by " the constitution entrusted with." It will not, I trust, be construed a want of respect to the authority of Sir Joseph Jekyll, to attempt to give additional force to his sentiments, by referring to the concurrence of Sir Thomas Clarke, who, concluding his opinion in *Burgess* v. *Wheate*, 1 Blackst. Rep. 123, with the above passage adds, " This description is full and judicious, " and what ought to be imprinted on the mind of every " judge."

(*h*) It is the duty of every court of justice, whether a court of law or of equity, to consult the intention of the legislature; 10 Rep. 57. b.: nor does it any where appear that in the discharge of this duty, courts of equity are invested with a larger or more liberal discretion than courts of law. " Yet, though a court of " equity will not differ from courts of law, in the expo- " sition of statutes, yet does it often vary in the reme- " dies given, and in the manner of applying them." Per

Lord Talbot, *Bosanquet* v. *Dashwood*, Forrester, 39, 40. Thus, if plaintiff in equity pray that an instrument or security given for an usurious consideration, be delivered up to be cancelled, the only terms upon which equity will interpose, are the plaintiff paying to the defendant what is really and bonâ fide due to him; and if the plaintiff do not make such offer by his bill, the defendant may demur; *Mason* v. *Gardner*, 1 Nov. 1793, MS.: whereas if the party, claiming under such instrument, come into equity to render his claim available, the court will proceed upon the letter of the statute; for though the court, in many cases, have a discretion whether it will interfere or not, and may therefore prescribe the terms of its interference; yet it will never exercise that discretion in favour of a plaintiff who is a wrong doer, seeking to render a court of equity the mean of effectuating the wrong. It may also be material to observe, that equity will not allow a statute, made for the prevention of fraud, to be converted into the instrument of fraud. 2 Roll's Ab. 378. And therefore, though the statute of frauds enacts, that no action shall be brought on contracts or agreements relating to lands, unless the same be reduced into writing; yet, under certain circumstances, which will hereafter be particularly noticed, [see B. 1. c. 3. s. 8.] equity will relieve on such contract or agreement. So, on the construction of the register act, 7 Anne, c. 20, though it is thereby enacted, that a registered deed shall take place of an unregistered deed, whence it might be argued, that if a person knew of the unregistered deed before he purchased, it should not stand against him; yet equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have. *Blades* v. *Blades*, 1 Eq. Ca. Ab. 358. pl. 12. *Hine* v. *Dodd*, 2 Atk. 275.

Le Neve v. *Le Neve*, 3 Atk. 646. Ambl. 436. *Doe, on demise of Watson*, v. *Routledge*, Cowp. 712. *Cheval* v. *Nichols*, Stra. 664. *Sheldon* v. *Cox*, 2 Eden's R. 224. That the notice must be actual and not merely implied, see *Jolland* v. *Stainbridge*, 3 Ves. 478.

(*i*) Sir William Blackstone addressing himself to the opinion of Lord Coke, that acts of parliament contrary to reason, are void, observes that, " if the parliament " will positively enact a thing to be done which is un- " reasonable, he knows of no power that can control " it. 1 Com. Intr. s. 3. The reason which he assigns, namely, that, " It would set the judicial power above " that of the legislature," is certainly entitled to great weight; yet it will be difficult to reconcile this opinion with the proposition which he lays down in the second section of his introduction, that " no human laws are " of any validity, if contrary to the law of nature;" which he describes as " coeval with mankind, and " dictated by God himself."

(*k*) " Principles of decision adopted by courts of " equity, when fully established, and made the grounds " of successive decisions, are considered by those " courts as rules to be observed with as much strict- " ness as positive law." Ld. Redesdale's Treatise, p. 4. And it will be found, that, even in cases of fraud, which from their nature must be almost infinitely various in their circumstances, courts of equity constantly proceed upon some clear and established principle, sufficiently comprehensive to meet the circumstances of the particular case to which it is applied, and not upon a vague, arbitrary, and indefinite power, which, in its exercise, might indeed prove mischievous to the individual and alarming to the state.

SECTION IV.

Now the subject matter both of law and equity, is contracts, as we have before observed; and a pact or covenant, in the general sense of it, comprehends all things about which men agree, in their transactions, negociations, and intercourse with one another. Yet it is not here to be extended so largely, as to take in every agreement of opinion; but such only as induce an obligation, or contain a conveyance of some right (*l*). Neither do we at present intend to treat of those universal pacts, by which the propriety and dominion of things was at first established; but those particular contracts, which are limited to the benefit of certain persons, and presuppose property and price (*m*); these (saith the Prætor), as

(*l*) Such contracts or agreements as do not induce an obligation, are considered as nuda pacta, as well by the common as by the civil law, and therefore cannot be made the subject of a demand in law or equity;" "ex nudo pacto non oritur actio." 2 Blackst. Com. 445. 16 Vin. Ab. 16. See c. 5. s. 1. note.

(*m*) Our author borrows this distinction between pacts and contracts from Puffendorff, b. 5. c. 2. s. 1.

the mouth and oracle of the law, and building his opinion on the sure foundation of natural justice and equity, if they are not gained by ill practice, nor made against the laws, I will see kept (1); for what can be so agreeable to human faith as the observance of those things which they themselves have approved of, and made a law amongst one another? In contracts, therefore, respect is first to be had to the things expressed in the agreement, if they may possibly be obtained; and for default of the things themselves, a sufficient equivalent is to be given (*n*).

(1) Dig. lib. 2. tit. 14. 7. l. 7.

See also Heineccius, Elem. Jur. Nat. and Gent. c. 14. s. 385. See a further distinction between obligations to give a certain thing and to do a particular act, pointed out and observed upon by Pothier Traité des Obligations, partie 2. c. 1. s. 3.

(*n*) The common and statute law act upon this principle to a certain extent. Thus the writ of assize restores the party to the actual seisin of his freehold; the words of the writ being facies tenementum seisiri, 2 Roll's Ab. 463. So, in the case of replevin, if the defendant prevail, the goods distrained are to be restored by writ de retorno habendo; in ejectment, if plaintiff establish his title, he shall have the possession of the land by writ of habere facias possessionem: this practice is said to have been introduced in the reign of Hen. VII. in consequence of courts of equity

compelling specific restitution. Bacon's Ab. (actions in general.) But Sir Henry Gwillim, the editor of that abridgement, refers it to an earlier period: So, in a writ of covenant brought by the lessee against the lessor, if the term be not expired, he shall recover the term again, if the lessor has put him out. Fitz. N. B. 325. Or if there be a covenant to convey or dispose of lands, the covenantee may have a special writ of covenant for a specific performance of the contract. 3 Blackst. Com. 165. So by the action of detinue, the judgment is, that the plaintiff recover the specific thing detained: so in action of waste, the plaintiff shall recover the land wasted.

These instances, though sufficient to show that courts of law recognize the principle upon which courts of equity decree the specific performance of agreements, do not by any means comprehend that almost infinite variety of cases to which the principle is applicable; and to supply that defect, the interference of a court of equity becomes necessary, governed, however, by a variety of considerations.

SECTION V.

But the law of England was very defective in this particular, and fell short of natural justice, where an actual conveyance was not obtained; which oftentimes, from the distance of the place where a local ceremony was required, or from other circumstances wanting, was not immediately practicable;

for executory agreements were then looked upon but as a personal security, and damages only to be recovered for the breach of them; most commonly either by an action of covenant, if there was a deed, or by an assumpsit, if without deed. But it proving a great hardship, in particular cases, to be left only to the uncertain reparation by damages, which the personal estate perhaps may not be able to satisfy, courts of equity, therefore, where there was a sufficient consideration, did, in aid of the municipal law, compel a specific performance (*o*). And there are many other cases wherein equity

(*o*) The jurisdiction exercised by courts of equity, in decreeing the specific performance of agreements, is certainly of a very ancient date, it being referred to in the Year-book of 8 E. IV. 4. b. as well known and established; yet it has been sometimes complained of, and attempted to be restrained, as an encroachment on the jurisdiction of courts of law, particularly in the case of *Bromage* v. *Jenning*, Roll's Rep. 368. pl. 21. 4 Vin. Ab. 399. pl. 1. It is now, however, by a series of decisions, established, that courts of equity may decree a contract to be performed in specie, at least wherever a court of law would give damages for the non-performance of it, but which damages would not be an adequate compensation for the non-performance, the party wanting the thing in specie. See b. 1. c. 3. s. 1. But an agreement to be decreed in specie must be fair and reasonable. *Phillips* v. *Duke of Bucks*, 1

will give relief, although there be a remedy at law, if that be insufficient; as for a nuisance, by injunction, or the like (*p*), yet

Vern. 227. *Bromley* v. *Jefferies*, 2 Vern. 415. *Green* v. *Wood*, 2 Vern. 632. *Young* v. *Clarke*, Pre. Ch. 538. Francis Max. p. 6. note.

As I shall have occasion to consider this subject more particularly in another part of this treatise, b. 1. c. 3. s. 1, it may be sufficient, in this place, to refer to the case of *Dodsley* v. *Kinnersley*, Ambler's Rep. 406, where Lord Hardwicke stated, that, before Lord Somer's time, the practice, as to agreements, was to send the party to law; and if he recovered any thing by way of damages, the court then entertained the suit; which practice appears, notwithstanding the observation of Lord Macclesfield in *Cannel* v. *Buckle*, 2 P. Wms. 243, to confirm the opinion of the court in the case of *Dr. Bettesworth* v. *Dean and Chapter of St. Paul's*, Sel. Ca. in Ch. 66. That equity will not entertain the suit, unless the plaintiff wants the thing in specie, is expressly recognized as the rule of the court by the Master of the Rolls (Lord Kenyon) in *Errington* v. *Annesley*, 2 Brown's Rep. 343, and had been proceeded upon in several earlier cases. *Cud* v. *Rutter*, 1 P. Wms. 570. *Cappur* v. *Harris*, Bunb. 135. *Dorison* v. *Westbrook*, 2 Eq. Ca. Ab. 161. pl. 8. 5 Vin. Ab. 540. pl. 22. *Pusey* v. *Pusey*, 1 Vern. 273. *D. of Somerset* v. *Cookson*, 3 P. Wms. 389. *Fells* v. *Read*, 3 Ves. jun. 70.

(*p*) In cases of nuisance, courts of equity interpose, (see *Coulson* v. *White*, 3 Atk. 21.) to prevent and restrain an injury, for which courts of law, in many cases, could not give an adequate compensation, yet

their decree binds the person only, and not the estate (*q*); because the Chancery is, in this respect, no court of record (1); though

(1) 4 Inst. 84.

still regarding the claims of the defendant, they will not interfere before answer, unless the plaintiff state a prescriptive right, or an agreement, and support the same by affidavit. *Morris* v. *Lessees of Lord Berkley*, 2 Ves. 452. *Fishmongers' Co.* v. *East India Co.* Dick. 164. *Attorney General at the relation of Gray's-Inn Society*, v. *Doughty*, 2 Ves. 453. See *Lord Bathurst* v. *Burden*, 2 Brown's Rep. 64. *Attorney Gen.* v. *Nicholl*, 16 Ves. 341. *Attorney Gen.* v. *Cleaver*, 18 Ves. 217, and the cases there cited, That courts of equity will restrain trespass, see *Mitchell* v. *Dors*, 6 Ves. 147. *Comthorpe* v. *Mapplesden*, 10 Ves. 290. *Crockford* v. *Alexander*, 15 Ves. 138. 16 Ves. 110. 18 Ves. 184. But every common trespass is not a foundation for an injunction, where it is only contingent and temporary. *Coulson* v. *White*, 3 Atk. 21. *Mogg* v. *Mogg*, Dickens' R. 670. 10 Ves. 200 in a note.

But courts of equity, for the purpose of preventing injury, will not only interfere in cases of nuisance, but also in cases of waste: for though the statute of Gloucester, 6 Edw. I. c. 13, has under certain circumstances, provided the writ of estrepment, in order to prevent the committing of waste, predente lite; yet it has been found, that this preventive is applicable to very few cases; see 15 Ves. 139. so that the most usual way of preventing it now is by bill in equity; see Ld. Redesdale's Treatise, 123, 124. 3 Bla. Com. 225, 226, 227, by which not only future waste may be restrained, but the timber already felled may be secured for the benefit of the party entitled to it, by restraining the party guilty of the waste from removing it. And courts of equity

some think this opinion absurd; for both ought equally to be bound by the decisions

will not only interpose to restrain what is waste at law; but also to restrain what is so held in equity as felling ornamental trees or trees planted for ornament. *Marquis of Downshire* v. *Lady Sandys*, 6 Ves. 107. Or to exclude objects from view, *Day* v. *Mony*, 16 Ves. 375. *Strathmore* v. *Bowes*, 2 Bro. Ch. R. 88. Or cutting down saplins, wavers or fruit trees, *Kaye* v. *Banks*, Dick. 431. *Chamberlain* v. *Dummer*, Dick. 600. Or defacing a family mansion house. *Vane* v. *Lord Barnard*, Gilb. Rep. 7 See *Dayrell* v. *Champness*, 1 Ab. Eq. 400. But the doctrine of equitable waste is not to be extended, *Burges* v. *Lamb*, 16 Ves. 185. That equity will restrain tenant from sowing land with mustard or other pernicious seed. See *Pacts* v. *Brett*, 2 Madd. R. 62. As to restraining the heir at law from committing waste in case of an executory devise, see *Stamfield* v. *Habergham*, 10 Ves. 276. As to the origin of this branch of equitable jurisdiction, see *Goodeson* v. *Gallatin*, Dick. 455.

But in the exercise of this branch of their jurisdiction, courts of equity are particularly cautious lest their interference should work an injury; and therefore they will not, in any case, restrain the defendant, before the time for his answering be expired, unless the plaintiff by an affidavit state the particulars of his title. *Whiteleg* v. *Whiteleg*, 1 Brown's Rep. 57. *Davis* v. *Leo*, 6 Ves. 784. And also of the truth of the several facts alledged in his bill. 2 Harrison's Ch. 237. *Hanway* v. *M'Intire*, 11 Ves. 54. Nor will they, even upon such affidavit, restrain the defendant from working a mine already opened, (see *Gray* v. *D. of Northumberland*, 13 Ves. 236. Sir W. Jones's Rep. 243. *Clavering* v. *Clavering*, 2

of this court, or else there would be an impotence in the court, that would restrain it from doing justice.

P. Wms. 389. *Gibson* v. *Smith*, 2 Atk. 182.) Unless it appear that the defendant has only a term in the estate for years or for life, and that the reversion be in the plaintiff. *Sir James Lowther* v. *Stamper*, 3 Atk. 496. Or that it be a breach of an express covenant, or an uncontroverted mischief. *Anon.* Ambler, 209. Upon a similar principle, courts of equity will restrain the printing and selling almanacks, bibles, and other works, at the suit of the owners and authors of such books. *Butterworth* v. *Robinson*, 5 Ves. 709. Or the use of an alledged new invention at the suit of the patentee. Ld. Redesdale's Treatise, 124. 129. *Anon.* 1 Ves. 476. *Bolton* v. *Bull*, 3 Ves. jun. 140. But it has been held, in some cases, that the plaintiff's exclusive right must be admitted by the defendant, or established at law, in order to warrant the interference of the court. *Anon.* 1. Vern. 120. *Hills* v. *University of Oxford*, 1 Vern. 275. *East India Company* v. *Sandys*, 1 Vern. 127. *Jeffreys* v. *Baldwin*, Ambler's Rep. 164. *Bateman* v. *Johnson*, Fitz-Gib. Rep. 106. *Horne* v. *Baker*, 9th May, 1710. *Blanchard* v. *Hill*, 2 Atk. 485. The principle upon which these cases appear to have proceeded is, that the injunction might operate irreparable damage to the defendant, in the event of the plaintiff's not being exclusively entitled; whereas the damage sustained by the plaintiff, in the event of his establishing his title, allows of compensation. But see *Hicks* v. *Raincock*, Dick. 646. As to injunctions to restrain publication of private letters, &c. see *Thompson* v. *Stanhope*, Ambl. 737. *Lady Percival* v. *Phipps*, 2 Ves. & B. 19. *Southey* v. *Sherwood*, 2 Meriv. 435. *Lord Byron* v. *Johnstone*, 2 Meriv. 29. As to

injunctions to restrain the negotiation of negotiable instruments, see *Smith* v. *Hartwell*, Ambl. 66. *Patrick* v. *Harrison*, 3 Bro. 476. That the patron of a rectory may restrain the incumbent, or that the king, by his attorney general, may restrain a bishop, from committing waste, see *Knight* v. *Morely*, Ambl. 176. But they are not entitled to an account of profits to enure to their own benefit. See also *Hoskins Featherstone*, 2 Bro. Ch. p. 552.

(*q*) Where the subject in dispute is not within the jurisdiction of the court, it is certainly true that the decree of the court operates merely in personam. *Jackson* v. *Petrie*, 10 Ves. 164. But if the lands be within the jurisdiction of the court, and the defendant refuse to perform the decree, as to give the plaintiff possession, the court will enforce its decree by the writ of assistance, which is for such purpose directed to the sheriff. *Penn* v. *Lord Baltimore*, 1 Ves. 454. *Stribley* v. *Hawkie*, 3 Atk. 275. *Roberdeau* v. *Rous*, 1 Atk. 543. *Foster* v. *Vassal*, 3 Atk. 587. This process, however, seems to have been first issued in the time of James the First. *Penn* v. *Lord Baltimore*. See *Pike* v. *Hoare*, 2 Eden's R. 184, and cases referred to, note (*a*).

SECTION VI.

HOWEVER the common lawyers continually poured out their complaints against this encroachment, as they imagined, on their own profession; yet pretended all the while, that their only concern was, lest this new jurisdiction should shake the foundation of

the ancient municipal laws of this realm. The law, say they, has appointed certain ceremonies, in the transferring of property, for the quiet and repose of society. It has also provided certain technical words, of peculiar and determined significations, for the limiting of the duration of men's estate; and it is better to stick to the known rules of law than to follow the fancies of private men (*r*). But if the assurance is bad, and

(*r*) It seems to have been formerly the practice of the chancellor to consult the judges, whether the case before him was such as called for the interposition of a court of equity. 2 Roll's Rep. 424. At what period, or for what reason this practice was discontinued, the books no where mention: it was probably, however, upon the discontinuance of this practice that courts of law became jealous of the encreasing powers of courts of equity, and endeavoured to restrain them; and though no instance is to be found of prohibitions being granted, to restrain proceedings in the court of Chancery, yet there are many instances of inferior courts of equity being so restrained, particularly where the suit was for a specific performance; for, said the court of King's Bench, "such relief in equity would wholly subvert the "actions of case and covenant, and compel a lease, "though the party contracting was entitled to make his "election, whether he would grant the lease, or pay the "damages sustained by the other party." *Bromege* v. *Jenning*, 1 Roll's Rep. 368. *Hudson* v. *Middleton*, 2 Roll's Rep. 433. The fallacy of this reasoning is obvious: it assumes, that the party contracting has an

yet there is a remedy, to what purpose is the common law? But equity was not satisfied with this false and shallow reasoning of the common lawyers. For it never pretended to any arbitrary sway over the stated rules of law, but only a power of conducting and guiding them according to honesty and good conscience; and what possible inconvenience can there arise, when there is a good consideration, and the intention is clear, that men should be compelled to perform their engagements, and that all the means, without which that cannot be obtained at law, should be supplied by a court of equity (*s*)?

election to perform his contract or not; whereas, in conscience, he is clearly bound to do the specific thing which he has covenanted to do, but which obligation a court of law cannot in all cases enforce. See B. 1. c. 3. s. 2.

(*s*) The imperfect execution of the contract not affecting the equity which is raised by the agreement, see 3 Black. Com. 432, 433, where this point is fully considered.

SECTION VII.

EQUITY, therefore, will supply any defects of circumstances in conveyances (*t*); as of livery (1), seisin (2) in the passing of a freehold (*u*), or of the surrender (*v*) of a copyhold (3), or the like. Also all misprisions

(1) Francis's Maxims, 55. *Bokenham* v. *Bokenham*, 1 Ch. Ca. 240. *Thompson* v. *Atfield*, 2 Ch. Rep. 112. *Jackson* v. *Jackson*, Select Ca. Ch. 81. (2) *Man* v. *Cobb*, Ch. Ca. 269. (3) *Smith* v. *Smith*, 1 Ch. Rep. 57. *Bradley* v. *Bradley* 2 Vern. 163. *Jenning* v. *Moore*, 2 Vern. 609. *Anon.* 2 Freeman, 65. *Taylor* v. *Wheeler*, 2 Vern. 564.

(*t*) This remedial power of courts of equity does not extend to the supplying of any circumstance for the want of which the legislature hath declared the instrument to be void. See *Hibbert* v. *Rolleston*, 3 Bro. Ch. Rep. 751. *Williams* v. *D. of Bolton*, 2 Ves. jun. 128. *Ex parte Bulteal*, 1 Cox's R. 243. (But query if by accident or fraud, the party be prevented from completing the instrument as prescribed by law.) Neither does this remedial power of courts of equity extend to the case of a defective fine as against the issue, nor of a defective recovery as against a remainder-man.

(*u*) And where a defective conveyance is aided, it is said that the estate shall be discharged of mesne incumbrances by the party, as if a mortgagee wants livery, and thereupon the heir confesses judgments to another, the mortgagee shall hold the land discharged from the judgments. *Burgh* v. *Burgh*, Finch's Rep. 28. So where the land is bound by articles made for a valuable consideration, and the money paid. *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 279. But quere whether in these cases the subsequent incumbrancer had not notice of

in deeds, as of the names of the parties (4), or the sum in a bond (*w*). And an award (5), or charter-party (6), though void or defective at law, may find relief here. Nor shall any fiction of the common law, as the extinguishment of a covenant by marriage,

(4) 2 Comyn's Dig. 126. *Downes* v. *Moreton*, 2 Ch. Ca. 68. *Simms* v. *Uray*, 2 Ch. Ca. 225.
(5) *Scott* v. *Wray*, 1 Rep. Ch. 45.
(6) *Edwin* v. *The East Ind. Com.* 2 Vern. 210; but see *Hotham* v. *East Ind. Com.* Dougl. 264.

the former; the general rule being that a court of equity will not interpose in prejudice of a defendant having a legal interest for a valuable consideration, and without notice of the plaintiff's equity.

(*v*) There is no doubt but that before the 55 G. 3. c. 192, courts of equity would have supplied the surrender of a copyhold, in favour of three descriptions of persons; creditors, wife and children; and even, in such cases, they proceeded subject to several restrictions. For though they would supply the surrender of copyholds in favour of creditors, if the other estates liable to the payment of debts are not sufficient. *Drake* v. *Robinson*, 1 P. Wms. 444. *Bixby* v. *Eley*, 2 Bro. C. R. 325. Yet if there were both freehold and copyhold estates devised for the payment of debts, and the freehold was sufficient for such purpose, they would not supply the surrender of the copyhold. *Hall* v. *Beane*, 1 Ves. 215. *Rafter* v. *Stock*, 1 Eq. Ca. Ab. 123, 124. *Hillier* v. *Tarrant*, Exch. Trin. T. 1791, and in supplying a surrender in favour of a wife, or younger children, (who must be legitimate; *Fursaker* v. *Robinson*, Pre. Ch. 475,) courts of equity respected the claims of the heir at law, and therefore would not interpose, if the heir would thereby be left unprovided for.

prevent the interposition of this court (7), for equity regards not the outward form, but the inward substance and essence of the matter (8), which is the agreement of the parties upon a good and valuable consideration (*x*), and where the persons inte-

(7) *Cannel* v. *Buckle*, 2 P. Wms. 243. *Acton* v. *Peirce*, 2 Vern. 480. See ch. 2. sect. 6 note (e).

(8) Francis's Maxims. Max. 93.

Kettle v. *Townshend*, 1 Salk. 187. *Hawkins* v. *Leigh*, 1 Atk. 387. See b. 2. c. 2. s. 2. note (*p*). But the heir, whose claim was thus respected, was one for whom the testator was under as strong a moral obligation to provide as for the devisee. *Chapman* v. *Gibson*, Rolls, 3 Bro. Ch. Rep. 229. And must be wholly unprovided for. *Pike* v. *White*, 3 Bro. Ch. Rep. 286. See also *Lindropp* v. *Eborell*, 3 Bro. Ch. Rep. 188. *Fielding* v. *Winwood*, 16 Ves. 90. *Rodgers* v. *Marshall*, 17 Ves. 296: in which last case the Master of the Rolls (Sir W. Grant) intimated his opinion, that the want of a surrender ought not to be supplied against a grandchild not otherwise provided for. See also *Wainwright* v. *Elwell*, 1 Madd. R. 627. And if the supplying of the surrender would not disinherit the heir, courts of equity would have supplied it in favour of the wife, though she were otherwise provided for. *Smith* v. *Baker*, 1 Atk. 386. But it was held in *Ross* v. *Ross*, 1 Eq. C. Ab. 124, that they ought not to supply a surrender for younger children against an elder, to make them in a better situation than the elder. This consideration, however, was not attended to in *Cook* v. *Arnham*, 3 P. Wms. 283. Forrester, 35; both the Master of the Rolls and Lord Talbot being of opinion that the father was the best judge what was a proper provision for his children. As to the cases in which copyhold will pass by will without surrender, see *King* v. *King*, 3 P. Wms. 360; and *vide*

rested fully intend to contract a perfect obligation, though by mistake or accident, they omit the set form of law. So that no remedy is to be had to compel a performance of it in courts of civil judicature, yet are they bound, in natural justice, to stand to their own agreement.

cases there cited. See also *Hills* v. *Downton*, 5 Ves. 557, and in those cases in which the court would supply a surrender, the effect of the surrender was bounded by the motive which induced the court to supply it; therefore, where the testator devised a copyhold to trustees in trust, to sell, and to pay the interest of the produce to the wife during her life, and after her death, to a stranger, the court, though it supplied the surrender in favour of the wife, decreed that the customary heir should be at liberty to apply after her death. *Marston* v. *Gowan*, 3 Bro. Ch. Rep. 170: and courts of equity would, in supplying the surrender of a copyhold estate in favour of a purchaser for valuable consideration, go still farther; for they would not only supply it against the party himself, and his heir, *Barker* v. *Hill*, 2 Ch. Rep. 113, but also against his assignees and creditors, if he become a bankrupt. *Taylor* v. *Wheeler*, 2 Vern. 565. I have noticed these distinctions as illustrative of the principles upon which courts of equity proceed in the exercise of this branch of their jurisdiction, and which, though not now applicable to copyholds, the act 55 G. 3. c. 192, having rendered a surrender of copyhold estates to the use of the copyholder's will unnecessary, will be found useful in defining the motives and extent of equitable interference in other cases of defective conveyance that is for and against the same persons. 17 Ves. 296.

Equity will also supply any defect in the execution of a power, provided the same be for a good or valuable consideration; but equity will not supply the non-execution of a power. See B. 1. c. 4. s. 25. See also Powell on Powers. As to distinction between a power and a trust, see *Brown* v. *Higgs*, 8 Ves. 561: which decree was affirmed in the House of Lords.

(*w*) Quere, whether equity will supply a defect in a bond against a mere surety? *Crosby* v. *Middleton*, 3 Rep. Ch. 55. *Sheffield* v. *Lord Castleton*, 2 Vern. 393. *Bishop* v. *Church*, 2 Ves. 101, 371. *Ex parte Symonds*, 1 Cox's R. 200.

(*x*) Though equity will relieve by supplying the defects of a conveyance upon a good or valuable consideration, yet it will not interfere if the conveyance be purely voluntary. *Pickering* v. *Keeling*, 1 Ch. Rep. 78. *Bonham* v. *Newcombe*, 2 Ventris, 365. *Lee* v. *Sir Robert Henley*, 1 Vern. 37. *Coleman* v. *Sarell*, 1 Ves. jun. 50.

SECTION

SECTION VIII.

AND any covenant, though not specific, but only a general covenant for indemnity, may be decreed here; for equity prevents mischief (*y*); and it is unreasonable that a man should have a demand continually hanging

(*y*) The prevention of mischief, which should be one of the principal objects of every system of jurisprudence, constitutes a very important branch of equitable jurisdiction. With a view to this object courts of equity entertain suits quia timet. *Baker* v. *Shelbury*, 1 Ch. Ca. 70. To prevent waste (as already noticed), to perpetuate testimony. *D. of Dorset* v. *Serj. Girdler*, Pr. Ch. 531. 1 Vern. 308. *Mayor of York* v. *Pilkington*, 1 Atk. 382. *Brandly* v. *Ord*, 1 Atk. 571. To secure, and before answer the property of a deceased debtor from being misapplied by his executor. *Taylor* v. *Allen*, 2 Atk. 212. *Cuthell* v. *Smith*, 12 Feb. 1793. But such suit must be against the executor, and not against the debtors, &c. of the deceased, unless the executor and debtors collude. *Elmslie* v. *Macauley*, 3 Bro. Ch. Rep. 624. *Utterson* v. *Mair*, 2 Ves. jun. 95. Upon the same principle courts of equity will decree the delivering up of deeds or securities of money, upon which the defendant might against conscience recover at law. (See *Ryan* v. *Macmeth*, 3 Bro. Ch. Rep. 15. *Pierce* v. *Hill*, Exch. Feb. 1811, where the distinction is stated upon this point): or will immediately, upon bill filed, and an affidavit of facts, restrain the defendant from negociating a bill of exchange or promissory note, if it appears that the legal or equitable defence of the

over him (1). Yet it seems, where the incumbrance is not necessary, but contingent, you should recover no damages at law till a breach, and therefore they ought not to decree it in equity. So, although the Chancery cannot assess damages (z), yet a covenant by the husband, that the jointure should be and continue of such a value, may be carried into execution in this court; for the Master may inquire into it, or they may

(1) *Ranelagh* v. *Hayes*, 1 Vern. 189. *Hungerford* v. *Hungerford*, Gilb. Rep. 69. *Hayes* v. *Hayes*, 1 Ch. Ca. 223. *Ayloff* v. *Fanshaw*, 1 Ch. Ca. 300. Maxims in Equity, Max. 8. *Lawson* v. *Wright*, 1 Cox's R. 275.

plaintiff against the defendant's demand would be defeated by the negociation. *Smith* v. *Haytwell*, Amb. 66. *Patrick* v. *Harrison*, 3 Bro. Ca. Rep. 476. So also to restrain the husband from assigning the property of the wife in order to defeat her equity to a settlement out of such property. *Ellis* v. *Ellis*, 6 July 1793. Ch. *Anon.* 9 Mod. 43. See *Daltsac* v. *Dalbice*, 16 Ves. 122. So also to prevent the defendant from being inducted to a living. *Potter* v. *Chapman*, Dick. 146.

(z) In *Denton* v. *Stewart*, 4th July 1786, MSS. Lord Kenyon, Master of the Rolls, sitting for the Chancellor, directed the Master to inquire what damage the plaintiff had sustained by the defendant's not performing his agreement, of which a specific performance was prayed by the bill, but which could not be decreed, the defendant having, by sale of the estate, put it out of his power to perform his agreement with the plaintiff. See also decree in *Cudd* v. *Rutter*, 1 P. Wms. 572, as taken by Mr. Cox from the Register's Book. But see *Todd* v. *Gee*, 17 Ves. 279. *Gwillim* v. *Stone*, 14 Ves. 128. *Greenaway* v. *Adams*, 12 Ves. 395.

send it to be tried at law in a quantum damnificatus (2). So a bill for a specific performance of an agreement by the husband with a third person, for a separate maintenance to the wife, is proper here, notwithstanding that alimony belongs to the spiritual Court (3). And, regularly, there are but four cases wherein an agreement will not be binding in equity: 1st, For want of assent: 2dly, For want of testimony of the assent: 3dly, Where there is some vice or defect in the subject matter: or, 4thly, The want of a sufficient consideration.

(2) *Hodges* v. *Everand*, M. 1699. 1 Eq. Ca. Ab. 18. pl. 7. See *Stafford* v. *Mayor of London*, 6 Vin. Ab. 472. pl. 10.

(3) See ch. 2. s. 6. note (*f*).

CHAP.

CHAP. II.

Of Assent to Agreements.

SECTION I.

We are first, then, to examine what consent is required to the making pacts and agreements valid; for the rule of the civil law is highly agreeable with natural justice (*a*), that, in the translation of property, there must be an union of minds and affections. For, whether it be a sale, or a loan, or a free gift, or any other sort of contract, unless there be a mutual agreement, it can never have a full effect. Now consent is an act of reason accompanied with deliberation (1); the mind weighing, as in a balance, the good and evil on either side. So that creatures void of reason and understanding are incapable of giving a serious and firm assent; and thus idiots, madmen, and in-

(1) Grotius de Jure Belli et Pacis, lib. 2. c. 11. s. 5.

(*a*) Every true consent supposes, 1st, a physical power; 2dly, a moral power of consenting; 3dly, a serious and free use of them. Puffendorf's Law of Nature and Nations, Barbeyrac's Note 1. b. iii. c. 6. s. 3.

fants were restrained by the Roman law from all manner of engagements and contracts, because they were supposed to be unable to judge of their own actions (*b*); and therefore the charge and care of them was committed to others (*c*). But the com-

(*b*) Furiosus nullum negotium gerere potest quia non intelligit quod agit. Infans et qui infantiæ proximus est non multum a furioso distant. Inst. lib. 3. tit. 20. s. 8. De Inutilibus Stipulationibus.

(*c*) The law of England, whilst it anxiously protects the interest of those whom the infirmities of disease, or imbecility of age, render incapable of protecting themselves, respects the right which every individual of a free constitution claims, and which, indeed, the very nature of a free constitution seems to require, that of disposing of his property as he thinks fit, provided he in so doing consults the rights and claims of others. The only restriction prescribed by the law of England in such case, being "sic utere tuo ut alienum non lædas." The civil law, however, extended its views and protection to persons whose prodigality might not only prejudice their own interests, but those of their offspring; and we find the authority of the Prætor frequently interposed to restrain the extravagance of the individual. "Solent Prætores si talem hominem invenerint, qui "neque tempus, neque finem expensarum habet, sed "bona sua dilacerando et dissipando profundit cura-"torem ei dare exemplo furiosi, et tamdiu erunt ambo "in curatione, quamdiu vel furiosus sanitatem, vel ille "bonos mores recuperit." Ff. 27. 10. 1. Furiosi vel ejus cui bonis interdictum sit nulla voluntas est. Digest. lib. 50. tit. 17. reg. 40.

mon lawyers endeavoured to set up a maxim of their own, in defiance of natural justice, and the universal practice of all the civilized nations in the world: for, they said, it was a known rule in their law, that no man of full age should be admitted in any plea to stultify and disable himself (2), because, when he recovers his memory, he cannot know what he did when he was of non-sane memory (*d*); and therefore they concluded,

(2) 39H.6.42. Co. Lit. 247.a. 4 Co. 124. Beverley's case. *Stroud* v. *Marshall*, Cro. Eliz. 398. F. N. B. 202.

(*d*) If the event of the plea had been determinable by the testimony of the party pleading it, there might have been some colour for the objection to it; but as the defendant must have substantiated the truth of his plea by evidence aliunde, it seems unaccountable how such a notion could have acquired the force of a rule of law. Sir William Blackstone has endeavoured to trace its progress; and observing that the plea, dum non fuit compos mentis suæ, was allowed in the time of Edward the First, he refers the origin of this opinion to the reign of Edward the Third; from which period it must be admitted to have been acted upon as a settled and established rule of law. "Though" (the same author remarks that) "later opinions, feeling the inconvenience "of this rule, have, in many points, endeavoured to "restrain it." 2 Com. 291, 292. I have, however, found only one printed case, in which the rigour of this rule seems to have been relaxed at law, which was an action of debt upon articles. Defendant pleaded non est factum; and, upon the trial, defendant offered to give lunacy in evidence. The Chief Justice first thought it ought not to be admitted, upon the rule that a man

he should have no relief for this, even in a court of equity, because it would be in subversion of a principle and ground in law (*e*). Yet some have thought, that, by the ancient common law, he might have the writ dum

shall not stultify himself; but on the authority of *Smith* v. *Carr*, 5th July 1728, where Chief Baron Pengelly in the like case admitted it, and not considering the case of *Thompson* v. *Leach*, in 2 Ventr. 198, the Chief Justice suffered it to be given in evidence, and the plaintiff, upon the evidence, was nonsuited. *Yates* v. *Boen*, Str. 1104.

(*e*) Though the principles upon which courts of equity in general relieve, appear to entitle the lunatic to relief, I have not found a single case, in which the plea of non compos by the lunatic himself, before inquisition, has been allowed; on the contrary, in *Bonner* v. *Thwaits*, Tothill, 130, it is said, that Chancery will not retain a bill to examine the point of lunacy. After the lunatic is so found by inquisition, his committee, indeed, may avoid his acts from the time he is found to have been non compos; as in *Clerk by Committee* v. *Richard Clerk* et al. 2 Vern. 412. *Addison by Committee* v. *Dawson* et al. 2 Vern. 678. *Ridler by Committee* v. *Ridler*, 1 Eq. Ca. Ab. 279. It may, however, be proper to observe, that courts of equity were formerly so anxious to adhere to the rule of law, that the lunatic was not allowed to be a party to a suit to be relieved against an act done during his lunacy; Smith's case, 1 Ch. Ca. 112; but see *Ridler* v. *Ridler*, 1 Eq. Ca. Ab. 279; though he might be party to a suit to enforce performance of an agreement entered into prior to his lunacy. Woolrich's case, 1 Ch. Ca. 153.

non fuit compos mentis, and of consequence might enter (3). And it is undoubtedly not for want of right to the thing, but of capacity to do the act, that a madman is hindered to avoid his own grant; for where the conveyance does not pass by livery of his hand, the conveyance is absolutely void (*g*); and therefore a surrender by deed of a tenant for life, being non compos, will not bar a contingent remainder (4). But now only privies in blood, *viz.* the general or special heir inheritable, may shew the disability of the ancestor (*h*), and privies, in

(3) Fitz. Nat. Brev. 449, 6th edition (*f*).

(4) 4 Co. 124. *Thompson* v. *Leach*, 3 Mod. Rep. 301. Carth. 435. 1 Salk. 427. 8 Lev. 284. 2 Ventris, 198. Show. Parl. Ca. 150.

(*f*) Though the authority of Fitzherbert upon this point is expressly over-ruled in *Stroud* v. *Marshal*, Cro. Eliz. 398; yet it seems supported by the reasoning and cases upon which it relies.

(*g*) Lord Coke, therefore, was of opinion, that an idiot could not avoid a feoffment by plea of idiocy, Co. Lit. 274, a. Quere, Whether such plea would not now be allowed, it having prevailed against a bond? *Yates* v. *Boen*, Stra. 1104.

(*h*) As the heir may avoid the alienations of his ancestor being non compos by entry; by writ dum non fuit compos mentis; and by plea, Co. Lit. 247. Quere, Whether equity would not interpose on behalf of a devisee, claiming under a will made by the testator when compos, against a grantee, claiming under a conveyance executed after the testator was found non compos?

representation as executors, (*i*) or administrators, the infirmities of the testator; and

(*i*) An idiot can have no executor, for being non compos à nativitate, he could at no time make a will; but a lunatic may have an executor, for lunacy is not a revocation of a will made when compos. Forse and Hembling's case, 4 Co. 91. b. And the Court of Chancery will, in order to secure the will, direct it to be brought into court. *Ex parte Hincks*, 3 Nov. 1792, MS. But equity will not entertain a suit, to perpetuate the testimony of witnesses to such will, in the life-time of the lunatic. *Sackville* v. *Aylworth*, 1 Vern. 105. Nor to perpetuate testimony of any other fact, in which the next of kin as such may be interested, for they may not be next of kin at the time of the lunatic's death, or he may recover. In supporting the validity of the will, notwithstanding the subsequent lunacy, the rule of the common law is conformable to the civil law, which provides, that "neque testamentum recte factum, neque "ullum aliud negotium recte gestum, postea furor in-"terveniens perimit." Inst. lib. 2. tit. 12. s. 1. And courts of equity will not only sustain contracts completed by the lunatic whilst sane; but, under certain circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy; "for the change of the condition of "a person entering into an agreement, by becoming "lunatic, will not alter the rights of the parties, which "will be the same as before, provided they can come "at the remedy; as, if the legal estate be vested in "trustees, a court of equity ought to decree a perform-"ance; but, if the legal estate be vested in the lunatic "himself, that may prevent the remedy in equity, and "leave it at law." *Owen v. Davis*, 1 Ves. 82. As to

neither privies in estate, nor privies in tenure (5), for the difference is between a title of entry, as by reason of a condition, and a right of entry (6), as in the cases before-mentioned; and the same diversity holds in case of infancy and coverture.

(5) 4 Co. 124.

(6) Whittingham's case, 8 Co. 42. b.

the effect of a defendant's becoming insane, after an arrest at law, it seems to be now settled, that such circumstance is not a reason for discharging him out of custody, on filing common bail. *Kernot* v. *Norman*, 2 Term Rep. 390. Nor will a court of law interpose, though the party be insane at the time of the arrest. *Mott* v. *Verney*, 4 Term Rep. 121. Nor will the court discharge the bail on the ground of the defendant's having since become a lunatic. *Ibbetson* v. *Lord Galway*, 6 Term Rep. p. 133. That equity will dissolve a partnership upon one of the partners becoming insane, see *Sayer* v. *Bennett*, 1 Cox's Rep. 107.

SECTION II.

However, the acts of a non compos or idiot, unless of record (*k*), for the inconve-

(*k*) The rule of law, in these cases, is, fieri non debet, sed factum valet; Herbert Perrott's case, 2 Ventr. 30. And Mansfield's case, 12 Co. 123, furnishes a striking instance of the extreme anxiety of courts of law to protect the authority of their records; for though the fine was levied by a man obviously an idiot, and by a most

nience of overturning a record by a nude averment, were avoidable by law, even during his life-time, in a scire facias by the king (1), who is bound by his royal office to protect all his subjects, their goods, and estates (*l*); and to prevent all incumbrances,

(1) Beverley's case, 4 Co. 124. Fitz. N. B. 232.

gross contrivance; and though Lord Dyer observed, that the judge who had taken it ought never to take another, yet he allowed it to prevail. As, by the common law, a fine might be avoided, on account of fraud, or even on account of infancy, by inspection, during the infancy (Bracton, 436. b. 437. a. Co. Litt. 380. b. See *Ferres* v. *Ferres*, 2 Eq. Ca. Ab. 695.) and Lord Hale's Jurisdiction of the Lords, 111. it seems remarkable, that idiocy or lunacy should not have been held entitled to the same effect; but Mansfield's case abundantly proves, that the grossest imbecility of mind was not, at law, a ground of annulling the record. But, in equity, the remainderman was relieved against a fine levied by an idiot, even against a purchaser. *Rushloy* v. *Mansfield*, Tothill's Transactions, 42. Vide also *Addison* v. *Mascall*, 2 Vern. 678. The Court of Chancery, however, in the case of fraud, does not absolutely set aside or vacate the fine; but, considering those who have taken it under such circumstances as trustees, decrees a reconveyance of the estate to the persons prejudiced by the fraud; and though this does not distinctly appear to be the practice, in the case of fines levied by idiots or lunatics, yet from the argument in *Day* v. *Hungat*, 1 Roll's Rep. 115, such may be inferred to be the rule of proceeding, 2 Vern. 307. 1 Ves. 289. See *Clark* v. *Ward*, Pre. Ch. 150.

(*l*) "The law not presuming an idiot likely ever to attain any understanding, formerly vested the custody

(2) 8 Rep. 170. it shall have relation to the disability (2). And this, they said, was no impeachment of the rule, because the idiot or non

of him and his lands in the lord of the fee; and therefore still, by special custom, in some manors, the lord shall have the ordering of idiot and lunatic copyholders; but, by reason of the manifold abuses by subjects, it was at last provided by common consent, that it should be given to the king, as general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. This fiscal prerogative of the king is declared in parliament by statute, 17 Ed. II. c. 9, which directs, in affirmance of the common law, that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, (which words, waste and destruction, must be construed in their ordinary, not their technical sense; *Oxenden* v. *Lord Compton*, 2 Ves. jun. 71;) and shall find them necessaries; and, after the death of such idiot, he shall render the estate to the heirs, in order to prevent such idiots from aliening their lands, and their heirs from being disinherited." 1 Bl. Com. 302. Although the statute respecting idiots, as also that respecting lunatics, 17 Ed. II. c. 10, refers only to the lands of the idiot or lunatic, yet it seems that the prerogative extends to the custody of his person, his goods, and chattels. Beverley's case, 4 Co. 126. Fitz. N. B. 232. As to the manner in which this branch of the prerogative is vested in the Chancellor, Lord Hardwicke observes, "that before the court of wards was erected, the jurisdiction, both as to idiots and lunatics, was in Chancery; and therefore, all such commissions were taken out and returned in Chancery; and after the court of wards was abolished

compos is no party to it; but the whole truth is found by the inquest. But no office could be found after his death (3), because

(3) 4 Co. 127. a.

by act of parliament, it reverted back to the court of chancery. See b. 2. pt. 2. c. c. 2. s. 1. note (*a*). And the sign manual is a standing warrant to the Lord Chancellor or any other officer of the crown (for the grant is not of necessity to the chancellor) to grant the custody of lunatics, and is a beneficial one in case of idiocy, because the king could not only grant the custody of idiots, but also the rents and profits of their lands." 2 Atk. 553. But see *Lysaght* v. *Royer*, Sch. & Lef. 153, in which case Ld. Redesdale expresses a doubt. And, in the matter of Heli, 3 Atk. 635, Ld. Hardwicke states the power of the Chancellor to extend to making grants from time to time of the idiot's or lunatic's estates; and as this power is derived under the sign manual, in virtue of the prerogative of the crown, the Chancellor, who is usually invested with it, is responsible to the crown alone for the right exercise of it; and therefore an appeal will not lie to the house of lords, from an order made in lunacy, but must be made to the king in council. 3 P. Wms. 107. *Sheldon* v. *Fortescue Aland.* Lords' Journals, 14th Feb. 1726. *Rochfort* v. *E. of Ely*, 6 Brown's Parl. Ca. 329. It is said that since the Revolution the crown has always granted the surplus profits of the estate of an idiot to some of his family. Ridw. P. C. 519. App. Note 1. It may be material to observe, that though the king may, by scire facias, or by information, avoid all acts done during the incapacity, yet his right to the mesne profits shall have relation only to the time of the office. Tourson's case, 8 Rep. 170. a. Having observed that the king may grant the lands of an idiot, this seems a

then the guardianship of the king was determined (*m*). And it seems to be upon the same ground, that bills in Chancery have been brought to set aside conveyances and settlements by idiots and lunatics, though in other respects reasonable, and for the convenience of the family; for these bills ought properly to be brought by the Attorney-general. Yet there is not a little difference between them. For a lunatic must be a party, as an infant, where a suit

proper place to refer to the doubt entertained by Lord Chancellor Nottingham, whether such grant could be extended to the executors of the grantee. *Prodgers* v. *Phrazier*, 1 Vern. 9. The doubt proceeded on the possibility of the executorship devolving on an infant, who, being held incapable of managing his own estate, could scarcely be thought a proper person to be intrusted with the charge of the person and lands of another. The court of King's Bench, however, did upon an issue, direct in that case, adjudge the grant to be good, holding it to be a trust coupled with an interest, of which an infant is capable. 3 Mod. Rep. 43. Skinner, 177.

(*m*) Though in strictness, the guardianship of the king may be said to be determined by the death of the lunatic, yet it has been held, that the chancellor may make an order in lunatic's affairs, after the death of the lunatic. *Ex parte Grimstone*, Ambler's Rep. 706. See also *ex parte Armstrong*, 3 Bro. Ch. Rep. 238. Fitzgerald's case, Sch. & Lef. 439.

is commenced on his behalf (*n*), because he may recover his understanding; and then he is to have his estate in his own disposal (4). The committee of a non compos is but a bailey, and accountable to him, or his representatives (*o*). But of an idiot, it is

(4) Woolrich's case, 1 Chan. Ca. 153.

(*n*) It is said, in Practical Register, 232, that "if the bill, in nature of an information, is to be relieved against some act done during the lunacy, the lunatic must not be named a party, for that were to stultify himself." Yet it seems the lunatic may be party to a bill, by his committee, to set aside acts done during his lunacy. *Ridler* v. *Ridler*, 1 Eq. Ca. Ab. 279. *Attorney-General* v. *Parnther*, Dick. 742.

(*o*) The custody of lunatics being a branch of the prerogative, the appointment of the committees must necessarily be in the discretion of the person to whom that branch of the prerogative is entrusted; but, in the exercise of this discretion, certain rules have been regarded, as best calculated to protect the person and interests of the unfortunate lunatic. "To prevent "sinister practices," says Sir William Blackstone, 1 Com. 305, "the next heir is seldom permitted to be "committee of the person of the lunatic, because it is "his interest that the party should die. But it hath "been said, that there lies not the same objection "against the next of kin, for it is his interest to preserve "the lunatic's life, in order to increase the personal "estate by savings, which he or his family may be "entitled to enjoy: the heir is, therefore, generally "made the manager of the estate, it being clearly his "interest by good management, to keep it in condition,

otherwise; for his recovery is not expected by the law; and therefore, in the Roman

" accountable, however, to the court of chancery, and " to the non compos himself, if he recover, or other- " wise to his administrators." This distinction was, however, very severely reprobated by Lord Chancellor Macclesfield, in Justice Dormer's case, 2 P. Wms. 264, as founded in barbarous times, before the nation was civilized; but as Mr. Hargrave remarks, it may be observed, in defence of it, that it gives the custody of the person to those who, in point of nearness of blood, have equal pretensions to the charge, without the same temptation, in point of interest, to abuse it. Lord Chancellor Finch, in Lady Mary Cope's case, 2 Ch. Ca. 239, appears, indeed, to have strained the rule beyond its original extent; in deciding, that a half-sister should not be committee of the person of the lunatic, because concerned to outlive her. A reason, which in fact does not apply; for, as Lord King observed, in Neale's case, 2 P. Wms. 544, and in *ex parte Ludlow*, 2 P. Wms. 638. " the personal estate may increase, and probably will, by good management, during the life of the lunatic; thus, the longer the lunatic lives, it will be the better for the next of kin." And if the committee of a lunatic unnecessarily keeps money in his hands, he shall pay interest; *ex parte Chumley*, 1 Ves. jun. 156. But though no committee should get any thing by his appointment, 2 Ch. Ca. 239. Ambler's Rep. 78; yet the allowance for the support of a lunatic should be liberal and honourable; 2 P. Wms. 262. *Ex parte Baker*, 6 Ves. 8; *In re Annesley*, Ambl. 78; but the committee shall not have any allowance for his care and trouble, 10 Ves. 103; but see Ambl. 78. And if necessary, the court will allow the yearly value of the lunatic's estate; 3 P.Wms.

law, he was looked upon as civilly dead. And these bills are now established in equity,

110. And so anxiously does the court consult the comfort of the lunatic, that it will continue a bankrupt as committee of the person, though it appoint another person to manage the fund for maintenance; *ex parte Mildmay*, 2 Ves. jun. 2; and so strictly does the court consider the committeeship a mere authority without any interest, that where the custody of the lunatic's estate was granted to husband and wife, the wife being next of kin to the lunatic, Lord Talbot held, that the husband's right was determined by the death of the wife, the grant being joint; *ex parte Lyne*, Forrester, 154. It must not, however, be inferred from this case, that the husband was necessarily joined in the grant; Lord Parker having held, *ex parte Kingsmill*, Mich. T. 1720, that the custody of a lunatic may be granted to a feme covert, though not sui juris; and, indeed, the court will seldom grant the custody to two, and in its choice is influenced by the sex of the parties applying, as well as by other circumstances. Therefore, where two persons equally akin to a feme lunatic, the one a man, the other a woman, applied for the custody, the woman was preferred as being of the same sex, and better knowing how to take care of her. *Ex parte Ludlow*, 2 P. Wms. 635.

With respect to the powers with which the committee of a lunatic is entrusted, they are necessarily restrained by the object of the trust; and, as a discretionary power might, in some instances, endanger that object, the committee cannot make leases; *Knipe* v. *Palmer*, 2 Wils. 130; nor encumber the lunatic's estate, without special order of the court, though the profits be not

where they hold, that the maxim of law before-mentioned is to be understood of acts done by the lunatic in prejudice of others,

sufficient to maintain the lunatic; therefore, in *Foster* v. *Merchant*, 1 Vern. 262. the lunatic, when sane, having mortgaged his estate for 50*l.* and the committee having afterwards taken up more upon it, the court refused to allow the mortgage to stand as a security for more than the 50*l.* or to charge the heir of the lunatic with the improvements made by the committee: but the court will allow the committee of a real estate of a lunatic to exercise the same power over it, in regard to cutting timber for repairs, as any discreet person, who was the absolute owner of it, might do; *ex parte Ludlow*, 2 Atk. 407. In *ex parte Marchioness of Annandale*, Ambler's Rep. 81, Lord Hardwicke states it to be, "a rule never departed from, not to vary or change the property of a lunatic, so as to effect any alteration as to the succession to it;" but in *ex parte Grimstone*, Ambler's Rep. 706, Lord Apsley, C. decreed incumbrances paid off in the lifetime of the lunatic, out of savings of the estate, to be assigned to attend the inheritance, and not in trust for the next of kin; he considering the ruling principle in the management of a lunatic's estate to be the doing of that which is most beneficial to the lunatic. And it is upon this principle, that the court will order part of the lunatic's personal estate to be laid out in repairs, or even upon improvements of his real estate, if the interest of the lunatic requires it, and the next of kin cannot shew good cause against it. *Serjeson* v. *Sealy*, 2 Atk. 414. *Oxenden* v. *Lord Compton*, 2 Ves. jun. 69. *Ex parte Talbert*, 6 Ves. 428. But see *Awdley* v. *Awdley*, 2 Vern. 192. That the produce of timber felled by the com-

that he should not be admitted to excuse himself on pretence of lunacy; but not as to acts done by him in prejudice of himself, for this can have no foundation in reason and natural justice.

mittee of a lunatic, by the direction of the court, belongs to the personal representative of the lunatic, see *ex parte Bromfield,* 3 Bro. Ch. Rep. 510. *Oxenden* v. *Lord Compton,* 2 Ves. jun. 69. 4 Bro. Ch. Rep. 231.

As to the authority of the court, to enforce the production of persons suspected to be idiots or lunatics, it seems clearly established, that, upon the commission being sued out, the person having the lunatic must, when required, produce him. *Lady Wenman's* case, 1 P. Wms. 701. *Ex parte Ludlow,* 2 P. Wms. 638. And though it was formerly doubted, it now seems to be settled, that a commission may be sued out against a lunatic resident abroad, and may be executed where his mansion-house was. *Ex parte Southcote,* Ambler's Rep. 109. And a person found a lunatic by a competent jurisdiction abroad, may be considered a lunatic here. *Ex parte Gillam,* 2 Ves. jun. 588.

By 4 Geo. 2. c. 10. lunatics being trustees or mortgagees, are empowered by themselves, or by their committees, to convey the estate of which they are seised in trust or mortgage; but it is doubtful whether the words of the act include all lunatics, as well such as are at large, as those of whom custody has been granted under the great seal: *ex parte Marchioness of Annandale,* Ambler's Rep. 80. It is, however, settled, that a commission of lunacy must have issued. *Ex parte Gillam,* 2 Ves. jun. 588. Ambl. 8. See also *ex parte*

Otto Lewis, 1 Ves. 298. 15 G. II. c. 30. enacts, that the marriage of a person duly found a lunatic, shall be null and void, unless he be previously declared sane by the Lord Chancellor, or his trustees. As to the superseding of a commission of lunacy, see *ex parte Holyland*, 11 Ves. 10.

SECTION III.

AS for the question, who shall be deemed an idiot, or non compos, no certain rule can be laid down. But it must be left to the wisdom and discretion of those to whom the law has entrusted the trial of it *(p)*.

(*p*) An idiot, or natural fool, is one that hath had no understanding from his nativity, and is therefore by law presumed never likely to attain any. 1 Bla. Com. c. 8. p. 302. If a person be born deaf, dumb, and blind, he being supposed incapable of any understanding, as wanting all those sources which furnish ideas, the law will consider him as an idiot. Co. Lit. 42. b. But though an idiot must be so à nativitate, yet, it seems to have been held in the King's Bench, that if by inquisition it be found that A. is an idiot, not having had any lucid intervals per spatium octo annorum, this is a sufficient finding; for the inquisition having found the party an idiot, the adding of the word spatium octo annorum is surplusage, and shall be rejected. *Prodgers* v. *Phrazier*, 3 Mod. 43. Skinner, 177. Lord

And although a man be found an idiot by inquisition (1), he may after pray to be

(1) Fitzherbert, Na. Bre. 518. 6th ed.

Donegal's case, 2 Ves. 408. But the same inquisitions being originally questioned in Chancery, the Lord Chancellor was of opinion, that it was utterly void. *Prodgers* v. *Phrazier*, 1 Vern. 12.

" A lunatic is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his senses. A lunatic is, indeed, properly, one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But, under the general name of non compos mentis, which, Sir Edward Coke says, is the most legal name, are comprised, not only lunatics, but persons under phrenzies, or who lose their intellects by disease; those that grow deaf, dumb, and blind, not being born so; or such, in short, as are judged by the court of Chancery incapable of conducting their own affairs." 1 Bla. Com. 304. I was induced to transcribe the whole of the above passage, in order to obviate the error into which the learned commentator seems to have fallen in the concluding sentence. The rules of judging upon the point of insanity being the same at law and in equity, (*Osmond* v. *Fitzroy*, 3 P. Wms. 130. *Bennett* v. *Vade*, 2 Atk. 327.) the Court of Chancery cannot assume any kind of discretion upon the subject; and therefore, in *ex parte Barnsley*, 3 Atk. 168, the return of the inquest, stating that W. B. was at the time of taking the inquisition, from the weakness of his mind, incapable of governing himself, and his lands and tenements, it was held illegal and void; and many adjudged cases being cited to the same effect, Lord Hardwicke congratulated himself, that,

examined in Chancery *(q)*. Yet this is not to be extended to every person of a weak

upon search of precedents, the court "had not gone farther, in departing from the legal definition of a lunatic, than in allowing returns of non compos mentis, or insanæ mentis, or since the proceedings had been in English, of unsound mind, which amounts to the same thing." And in Lord Donegal's case, 2 Ves. 407, he, upon the same principle, refused a commission of lunacy, though he admitted the weakness of Lord Donegal's understanding to be extreme. But that the court will allow maintenance to one insane though not found so, see *Machin* v. *Salkeld*, Dick. 634.

But though the court of chancery, in judging upon the point of insanity, is governed by the rules of law, yet, if a man, by age or disease, is reduced to a state of debility of mind, which, though short of lunacy, renders him unequal to the management of his affairs, the court will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do such other acts as his interest, or the rights of others, may require. 3 P. Wms. 111. Note B. refers to Anon. case p. Lord Talbot, Mich. 1733. And in *ex parte Nadin*, 4th Nov. 1786, Lord C. Thurlow said, that he was not against the practice of finding a man lunatic who was, by the infirmities of age, rendered unequal to the management of his affairs; but the more usual course is to appoint him a guardian, (*Living* v. *Calverly*, Pre. Ch. 229. Gilb. Rep. 4.) or some person to act for him, in the receiving and managing of his property. *Ex parte Bird*, 4 Bro. Ch. Rep. 100. As to a will made under undue influence, see *Mountain* v. *Bennett*, 1 Cox's R. 354. As to the

understanding, unless there be some fraud or surprise (*r*); for courts of equity would

general rules of determining what shall be considered a lucid interval, where previous lunacy has been proved or admitted, see *Attorney General* v. *Panther*, Ch. Hil. T. 1792. p. 65, note (*x.*)

(*q*) The 2 Ed. VI. c. 8. s. 6, also provides, that "if any be, or shall be untruly found lunatic, &c. that every person or persons grieved or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage, as in other cases of traverse upon untrue inquisitions or offices founden." It has been doubted, however, whether the party aggrieved by the inquisition must not apply to Chancery, notwithstanding this provision of the statute. Ley, 26, 27. Certain it is that he must apply, in order to suspend the grant of the custody of the person, which regularly is immediate upon the return of the inquest; though, according to 18 Hen. VI. c. 4, the custody of the land ought not to be granted till a month after, in order that the parties affected by it may have time to traverse it: *ex parte Roberts*, 3 Atk. 5. For the doctrine of traversing an inquisition, see the cases referred to, in *ex parte Roberts*, 3 Atk. 7. 311. *Ex parte Wragg*, 5 Ves. 450. 833. The 2 Ed. VI. gives the right to traverse to all persons aggrieved by the inquisition; yet the heir may not traverse it, but is bound upon the traverse by the lunatic, or his alienee, who may traverse it: *ex parte Roberts*, 3 Atk. 308. 1 Ch. Ca. 113. *In matter of Fust*, 1 Cox, 3 R. 418. In case of the lunatic's recovery, he must petition the Chancellor to supersede the commis-

have enough to do, if they were to examine into the wisdom and prudence of men in

sion; upon the hearing of which, the lunatic should attend in person, that he may be inspected by the Chancellor; it is also usual for the physician to attend, or to make an affidavit that the lunatic is perfectly recovered.

(*r*) It has been already observed, that mere weakness of understanding is not a sufficient ground to support a commission of lunacy; it furnishes, however, a strong ground of suspicion that persons in such state, executing conveyances, are acted upon by some improper influence; and, therefore, wherever fraud or surprise can be imputed to, or collected from the circumstances of the transaction, equity will interpose, and relieve against it. *Wright* v. *Booth*, Toth. 101, 102. *White* v. *Small*, 2 Ch. Ca. 103. *Jones* v. *Crawley*, Finch, 161. *Clarkson* v. *Hanway*, 2 P. Wms. 203. *James* v. *Graves*, 2 P. Wms. 270. *Osmond* v. *Fitzroy*, 3 P. Wms. 130. *Portlington* v. *Eglington*, 2 Vern. 189. *Bennett* v. *Vade*, 2 Atk. 324. *Lord Donegall's* case, 2 Ves. 407. It is said, however, that it must not be understood, from cases of this kind being generally brought into equity, that our courts of law are incompetent to relieve; for where the fraud can be clearly established, courts of law exercise a concurrent jurisdiction with courts of equity. *Bright* v. *Eynon*, 1 Burrows, 396, and will relieve by making void the instrument obtained by such corrupt agreement or fraud. (But see *Simpson* v. *Vaughan*, 2 Atk. 31. Wood's Institute, 296.) Therefore, where the obligor was an unlettered man, and the bond was not read over to him, he was allowed to plead this circumstance in an action on the bond. 9 H. 5. fol. 15, cited in *Henry*

disposing of their estates. Let a man be wise, therefore, or unwise, if he be legally compos mentis, he is a disposer of his property, and his will stands instead of a reason (2). And although drunkenness is a kind of insanity for the time, yet, as it is of his own procuring, it shall not turn to his avail, either to derogate from his act, or to lessen his punishment, but it is a great offence in itself (*s*). And this holds as well to his life (3), his lands, goods, or any

(2) *Bath and Montague's* case, 3 Ch. Ca. 107. Heineccius, c. 14. s. 392.

(3) 1 Inst. 247. Plowden, 19. 1 Hale's P. C. 32. 1 Hawkins, P. C. 3.

Pigot's case, 11 Co. 27. b. So if the bond be in part read to an unlettered man, and some of its material contents be omitted or misrepresented, see 2 Roll's Ab. 28. pl. 8. Finch's Law, 109, and cases there referred to. I mean not, in this place, to discuss the question, whether courts of law have, in all cases of fraud, a concurrent jurisdiction with courts of equity; but think it material to observe, that Lord Coke, by the same passage, 3 Inst. 84, in which he confines the jurisdiction of courts of equity to such "frauds, covins, and deceit, for which there is no remedy by the ordinary course of law," seems to admit, that all frauds were not relievable at law.

(*s*) Vide *Cole* v. *Robins*, H. 2 An. per Holt, which is referred to by Mr. Justice Buller, in his Nisi Prius, p. 172, as shewing, that upon non est factum, defendant may give in evidence, that they made him sign the bond when he was so drunk that he did not know what he did.

thing concerning him. However, equity (*t*), as it seems, will relieve in this case (4); especially if it were caused by the fraud or contrivance of the other party (5), and he is so excessively drunk, that he is utterly deprived of the use of reason or understanding: for it can by no means be a serious and deliberate consent; and without this, no contract can be binding by the law of nature. And so, although there is no direct proof that a man is non compos, or delirious, yet, if he is of a weak understanding, and is harassed and uneasy at the time; or if the deed be executed in extremis; or by a paralytic; it cannot be supposed he had a mind adequate to the business he was about, and might more easily be imposed upon (6); especially the provision in the deed being something

(4) *Rich* v. *Sydenham*, 1 Ch. Ca. 202.

(5) *Johnson* v. *Medlicott*, 3 P. Wms. 130, note (A.)

(6) *Filmer* v. *Gott*, 7 Bro. P. C. 70. *Fane* v. *D. of Devonshire*, 2 Bro. P. C. 77.

(*t*) Lord Hardwicke, in *Cory* v. *Cory*, 1 Ves. 19, was of opinion, that the drunkenness of one of the parties was not sufficient to set aside an agreement, unless some unfair advantage was taken; and, therefore, in the case before him, the agreement being reasonable, and no unfair advantage appearing to have been taken, he refused to set it aside, though the party complaining of it was drunk when he executed it. See *Stockley* v. *Stockley*, 1 Ves. & B. p. 30.

extraordinary (*u*), or the conveyance without any consideration (7). And the rule of the common law itself, in case of wills, is very favourable; although it can hardly, perhaps, be extended to deeds, without

(7) *Clarkson* v. *Hanway*, 2 P. Wms. 203. *Bridgeman* v. *Green*, 2 Ves. 627. *Bennet* v. *Vade*, 2 Atk. 324.

(*u*) In *James* v. *Graves*, 2 P. Wms. 270, Lord Commissioner Jekyll seems to lay some stress upon the circumstance of a deed not being revocable as a will, and therefore liable to be set aside, if gained from a weak man by misrepresentation, and without any valuable consideration. But it appears from the case of *Fane* v. *D. of Devonshire*, 2 Brown's Parl. Ca. 77, that though a deed obtained in extremis, and by imposition, do contain a clause of revocation, the principles upon which courts of equity proceed, will equally attach and entitle the party prejudiced to be relieved against it. Whether courts of equity could interpose, and relieve against fraud practised in the obtaining of a will, appears to have been formerly a point of considerable doubt. In some cases, we find the court of Chancery distinctly asserting its jurisdiction; as in *Maundy* v. *Maundy*, 1 Ch. Rep. 66. *Well* v. *Thornagh*, Pre. Ch. 123. *Goss* v. *Tracy*, 1 P. Wms. 287. 2 Vern. 700; in other cases, disclaiming such jurisdiction, though the fraud was gross and palpable; as in *Roberts* v. *Wynne*, 1 Ch. Rep. 125. *Archer* v. *Moss*, 2 Vern. 8; and in other cases, steering a middle course, by declaring the party who had practised the fraud a trustee for the party prejudiced by it. *Herbert* v. *Lownes*, 1 Ch. Rep. 13. *Thynn* v. *Thynn*, 1 Vern. 296. *Devenish* v. *Barnes*, Pre. Ch. 3. *Barnesley* v. *Powell*, 1 Ves. 287. *Marriott* v. *Marriott*, Str. 666. That an action at law will lie upon a promise, that if the devisor would not charge the land with a rent-charge, the devisee would

circumstances of fraud or imposition. For a memory, which the law holds there to be a sound memory, is, when the testator hath understanding to dispose of his estate with judgment and discretion, which is to be

pay a certain sum to the intended legatee of the rent. See *Rockwood* v. *Rockwood*, 1 Leon. 192. Cro. Eliz. 163. See also *Dutton* v. *Poole*, 1 Vent. 318, 332. *Beringer* v. *Beringer*, 16 June, 26 Car. II. *Chamberlain* v. *Chamberlain*, 2 Freem. 34. *Leicester* v. *Foxcroft*, cited Gilb. Rep. 11. *Reach* v. *Kenningall*, 26 October, 1748.

But since the cases of *Kenrick* v. *Bransby*, 3 Brown's P. C. 358, and *Webb* v. *Cleverden*, 2 Atk. 424, it appears to have been settled, that a will cannot be set aside in equity for fraud and imposition, because a will of personal estate may be set aside for fraud in the ecclesiastical court, and a will of real estate may be set aside at law: for in such cases, as the animus testandi is wanting, it cannot be considered as a will. *Bennett* v. *Vade*, 2 Atk. 324. *Anon.* 3 Atk. 17. Though equity will not set aside a will for fraud, nor restrain the probate of it in the proper court, yet, if the fraud be proved, it will not assist the party practising it, but will leave him to make what advantage he can of it. *Nelson* v. *Oldfield*, 2 Vern. 76. But if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the prerogative court to controvert its validity. *Sheffield* v. *Duchess of Buckingham*, 1 Atk. 628. Lord Hardwicke having admitted, that a court of equity cannot set aside a will for fraud, observes, in the above case of *Sheffield* v. *Duchess of Buckingham*, that "the admission of a fact

collected from his words, actions, and behaviour, at the time (*x*), and not from his

by a party concerned, and who is most likely to know it, is stronger than if determined by a jury; and facts are as properly concluded by an admission, as by a trial." That the party prejudiced by the fraud may file a bill for a discovery of all its circumstances, is unquestionable. Supposing, then, the defendant to admit the fraud, if the admission is to have the effect ascribed to it by Lord Hardwicke, it still remains to be determined how a court of equity ought to proceed. If it could not relieve, it would follow, as a consequence, that so much of the bill as seeks relief would be demurrable; but the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving such relief.

(*x*) "There is an infinite, nay, almost unsurmountable difficulty, in laying down abstract propositions upon a subject, which depends upon such a variety of circumstances, as the legal competency of the mind to the act in which it is engaged, if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility sufficiently strong to lead to a suspicion of intellectual incapacity. General rules are easily framed. The difficulty arises on the application of them; for few are sufficiently comprehensive to embrace every circumstance which may enter into, and materially affect the particular case. There can be no difficulty in saying, that if a mind be possessed of itself, that at the period of time when such mind acted, it ought to act efficiently. This rule, however, goes very little way; for it is extremely dif-

giving a plain answer to a common question (8). And therefore, a will obtained in extremis, and upon importunity of the

(8) *Marquis of Winchester*'s case, 6 Co. 23. *Herbert* v. *Lownes*, 1 Ch. Rep. 13.

ficult to lay down, with tolerable precision, the rules by which such state of mind can be tried: but the course of procedure, for such purpose, allows of rules. If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement. If such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must shew sanity and competence at the period when the act was done, and to which the lucid interval refers. And it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong, and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such a case applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for, from an act, with reference to certain circumstances, and which does not of itself mark the restoration of that mind, which is in general deemed necessary to the disposition and management of affairs, it were extremely dangerous to draw a conclusion so general, as that the party, who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others." I have extracted the foregoing passage from the very able and elaborate judgment given

testator's wife, his hand being guided in the writing of his name, may be set aside (9).

(9) *Money-penny* v. *Brown*, 15th May 1711. 8 Viner's Ab. 167. pl. 7.

by Lord Chancellor Thurlow, on a motion for a new trial, in the *Attorney-General* v. *Parnther*, Hil. 1792, which judgment is, with some slight difference, reported in Mr. Brown's third volume of Reports in Chancery, p. 441. See *Cartwright* v. *Cartwright*, Phillimore's Reports, 99. 120.

I cannot conclude my notes on the subject of lunacy, without referring the reader to the very valuable work of Mr. Collinson on the subject.

SECTION IV.

AND the grants of infants and lunatics are parallel both in law and reason (1); for infants are disabled, by a maxim in law, to contract for any thing but necessaries for their persons (*y*), suitable to their degree

(1) 3 Mod. 130.

(*y*) As necessaries for an infant's wife are necessaries for him, he is chargeable for them, unless provided before the marriage; in which case he is not chargeable, though she uses them afterwards. *Turner* v. *Trisby*, 1. Stra. 168. An infant is also liable to an action for the nursing of his lawful child; nam persona conjuncta æquiparatur interesse proprio. Lord

(2) Co. Litt. 172. Cro. Jac. 560. 494. 1 Lev. 86.

and quality (2). And what is necessary, or not, shall be tried by the judges, and not

Bacon's Maxims, Reg. 18. But though an infant may, if not provided for, *Bainbridge* v. *Pickering*, Bla. Rep. 1325, contract for necessaries, he cannot borrow money to buy them, for he may misapply the money, and therefore the law will not trust him, but at the peril of the lender, who must lay it out for him, or see it laid out, and then it is his providing, and his laying out so much money for necessaries for him. *Earle* v. *Peale*, 1 Salk. 387. *Darby* v. *Boucher*, 1 Salk. 279. *Barlow* v. *Grant*, 1 Vern. 255. But in *Marlow* v. *Pitfield*, 1 P. Wms. 559, the Master of the Rolls held, that if one lend money to an infant to pay a debt for necessaries, and, in consequence thereof, the infant does pay the debt, although he may not be liable at law, he must, nevertheless, be so in equity; for the lender of the money stands in the place of the person paid, *viz.* the creditor, for necessaries, and shall recover in equity, as the other might have done at law; and, on the same principle, it was decreed, that the lender of money to a feme covert for such purpose, it having been so applied, might, in equity, recover against the husband. *Harris* v. *Lee*, 1 P. Wms. 483. That an executor may pay an infant a legacy for the purpose of necessaries, see *Davis* v. *Austen*, 3 Bro. Ch. Rep. 179. *Philips* v. *Paget*, 2 Atk. 80. In what cases such payment may be made to the father, see *Cooper* v. *Thornton*, 3 Bro. Ch. Rep. 96. 186. Respecting marriage settlements by infants, though there be no decision, that a *male* infant may settle his real estate, yet it is now settled, that a female infant may bar her dower, by consenting to a jointure in lieu thereof, if made agreeable to the 27 H. VIII. c. 10. *Earl of Buckingham-*

by a jury (3). Which maxim was grounded upon a presumption, that infants most

(3) *Mackarell* v. *Bachelor*, Cro. Eliz. 583.

shire v. *Drury*, 5 Bro. P. C. 570. 2 Eden's Rep. 39. *Jordan* v. *Savage*, 2 Eq. Ca. Ab. 101, 102. It also seems to have been decided, that the interest of a female infant, in a money portion, may be bound by agreement on her marriage; for, says Lord Hardwicke, if a parent or guardian cannot contract for the infant, so as to bind her personal property, the husband, as it is a personal thing, would be entitled to it absolutely upon the marriage. *Harvey* v. *Ashley*, 3 Atk. 613. But how far the real estate of an infant can be bound by any agreement entered into during infancy, appears to be still subject to some doubt. In *Cannel* v. *Buckle*, 2 P. Wms. 243. Lord Macclesfield held, that "if a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant, in consideration of a settlement, to convey her inheritance to her husband, if in consideration of a competent settlement, equity would execute the agreement." "This," Lord Hardwicke (in the above case of *Harvey* v. *Ashley*) observes, "is going a great way, as it related to the inheritance of the wife; but yet there are cases where the court will do it, as if the lands of the wife were no more than an adequate consideration for the settlement that the husband makes; and, after the marriage, the wife should die, and leave issue, who would be entitled to portions provided for them by the settlement, it would, in that case, be very reasonable to affirm that settlement." From this it appears, that his Lordship considered the leaving of issue, as well as the adequacy of the settlement, material to its binding the rights of the infant; and, in another passage in the same case, he assigns, as a reason for applying for an act of parliament, upon the

commonly, before they are of the age of twenty-one years, are not able to govern themselves (z): and therefore the law takes

marriage of an infant who has an interest in real estate, that the real estate will not be bound, unless the husband should have issue of that marriage. In the case of *Durnford* v. *Lane*, 1 Brown's Rep. Ch. 106, Lord Thurlow particularly observes, upon its being required, by the cases of *Cannel* v. *Buckle*, and *Harvey* v. *Ashley*, that the settlement should be competent; a consideration, to which, in his opinion, the court could not advert; but, in a subsequent case, *Williams* v. *Williams*, 1 Brown's Rep. Ch. 152, he expressly holds, that "to bind an infant, the settlement must be fair and reasonable." *Carruthers* v. *Carruthers*, 4 Bro. Ch. Rep. 502. *Clough* v. *Clough*, 5 Ves. 710. *Chitty* v. *Chitty*, 3 Ves. 545. *Smith* v. *Smith*, 5 Ves. 189. It seems also necessary, in order to support such settlement by a feme infant, that it be made before marriage. *Lucy* v. *Moor*, 3 Bro. P. C. 514. *Seamer* v. *Bingham*, 3 Atk. 56. Though it has never been determined, that a male infant can, except in the case of a power, (see *Hollingshed* v. *Hollingshed*, cited in 2 P. Wms. 229, and p. 72, 78,) do any act to bind his real estate; yet, where a male infant married an adult, who, by settlement upon the marriage, covenanted that her estate should be settled to certain uses, he was held bound by her covenant. *Slocombe* v. *Glub*, 2 Brown's Rep. Ch. 545.

(z) The law of England, whilst it protects the imbecility of infants, still keeps in view that respect which is due to the fair claims and interests of others, and will not allow that, which, in the emphatical language of Lord Mansfield, was intended as a shield,

upon itself the protection of their rights, and ordains, that they shall be favoured in all things which are for their benefit, and not prejudiced by any thing to their disadvantage (*a*). So that neither as bailiff,

and not as a sword, to be turned into an offensive weapon of fraud and injustice; therefore an infant conusant of a fraud shall be as much bound as an adult. *Evroy* v. *Nicholas*, 2 Eq. Ca. Ab. 489. *Savage* v. *Foster*, 9 Mod. 38. *Watts* v. *Creswell*, M. 1 G. 1. 9 Vin. Ab. 415. *Beckett* v. *Cordley*, 1 Brown's Rep. Ch. 353. But in *Sanderson* v. *Marr*, Blackstone's C. P. Term Rep. 75, it was held, that this rule was confined to such acts as were only voidable; see p. 75; and that a warrant of attorney, given by an infant, being absolutely void, the court could not confirm it; though the infant appeared to have given it, knowing that it was not valid, and for the purpose of collusion. But though, in most cases of fraud, an infant is not allowed to take advantage of his own wrong, yet he is not liable at law to an action of deceit. *Johnson* v. *Pie*, Siderfin, 258.

(*a*) If an infant, says Lord Mansfield, does a right act, which he ought to do, or which he was compellable to do, it shall bind him: as if he make equal partition; if he pay rent; if he admit a copyholder upon a surrender: for, generally, whatever an infant is bound to do by law, the same shall bind, although he doth it without suit of law. *Zouch* v. *Parsons*, 3 Burrow's Rep. 1801. If an infant enter into a contract, with the advice and concurrence of his friends, and such contract appear to be beneficial to the interests of the infant, equity will support, and give it effect;

nor for goods to carry on a trade, can an infant be charged; because there was no

for otherwise the rule of law, which restrains the contracting of infants, might operate the most fatal and irreparable prejudice to the very interests it is intended to protect. The 29 G. II. c. 31, therefore enables infant lessees to surrender their leases for the purpose of renewal; and courts of equity, consulting the same principles, had held, previously to the act of parliament, that the guardian of an infant might surrender a lease for the purpose of renewal. *Mason* v. *Day*, Pre. Ch. 319. *Pierson* v. *Shore*, 1 Atk. 480. Where J. S. mortgaged his estate to the plaintiff, and died, leaving the defendant, his daughter and heir, who was an infant, and had nothing to subsist on but the rents of the mortgaged estate, and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneasy at it, and threatened to enter on the estate, unless his interest was made principal; upon which, the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herself, who was then near of age, signed it; and the account being admitted to be fair, it was held, that though, regularly, interest, shall not carry interest, yet that, in some cases, and upon some circumstances it would be injustice, if interest were not made principal, and the rather, in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. East, 1699, Earl of *Chesterfield* v. *Lady Cromwell*, 1 Eq. Ca. Ab. 287. Upon the same principle, an infant was held bound by an award made upon a reference, with the consent of his guardian. *Bishop of Bath and Wells* v. *Hippesly*, cited by Lord Hardwicke, 3 Atk. 614. So also by a covenant to

necessity that he should trade, neither does it appear for his advantage (4); and such

(4) Co. Litt. 172. a. *Whittingham* v. *Hall.* Cro. Jac. 494. *Smally* v. *Smally*, 1 Eq. Ca. Ab. p. 6. pl. 3. *Williams* v. *Harrison*, Carthew, 160. *Wyvall* v. *Champion*, 2 Stra. 1083.

settle land of a certain yearly value, he having a power to settle the same by way of jointure. *Hollingshed* v. *Hollingshed*, cited 2 P. Wms. 229, and 1 Stra. 604. But if the agreement, under all the circumstances which led to it, cannot be construed beneficial to the infant, it will not bind him either in law or equity. If, therefore, an infant execute a bond with a penalty, as it could not be for his benefit to subject himself to a penalty, the law will not support the contract. Co. Litt. 172. a. Moor, 679. *Manning* v. *Knapp*, Cro. Eliz. 700. *Ayliffe* v. *Archdale*, Cro. Eliz. 620. But an obligation for the very sum laid out for necessaries will be good, S. C. Neither can an action be sustained against an infant on a stated account; for the nature of the action would, in strictness, preclude him from impeaching the consideration and particulars of the account. *Freeman* v. *Hurst*, 1 Term. Rep. 40, and *Bartlett* v. *Emery*, therein cited. Yet it may be inferred, from the case of *Freeman* v. *Hurst*, that an action will lie on a promissory note, or other negotiable security, given by an infant for necessaries; quere, whether, in such action, by a third person, he would be precluded from impeaching the consideration of it? That such action would lie does not break in upon the authority of *Williams* v. *Harrison*, Carth. 160; for, in that case, the court seem to have relied upon the circumstance of the security being given in the course of trade, and not for necessaries.

If the particular measure proposed be doubtful in its tendency, the more prudent course for trustees to

contracts as may not be intended for his benefit, are absolutely void (*b*).

pursue, is to seek the indemnity of a court of equity, which will direct one of its officers to inquire and report whether the measure be, or be not, in its probable effect, beneficial to the infant. The case of *Hallett* v. *James*, 1 July 1794; 10 March 1795, at the Rolls, is a very strong instance of the utility of such course of proceeding. See also *Cecil* v. *Earl of Salisbury*, 2 Vern. 224. *Kilvington* v. *Harrison*, 22 July 1794, Rolls.

(*b*) It has been already observed, that the contracts of infants, which cannot, under all the circumstances which led to them, be construed favourable to their interests, shall not bind them either in law or equity; but our author, from the above passage, seems to have considered such contracts as absolutely void; and in that opinion he is certainly sanctioned by some very high and respectable authorities. Vide *Holt* v. *Ward*, Fitzgibbon's Rep. 175. 275. *Harvey* v. *Ashley*, 3 Atk. 610. Such opinion, however, has been often controverted, and particularly in the case of *Zouch* v. *Parsons*, 3 Burr. 1794, as liable to many objections; for if it were true, that all such contracts were absolutely void, it would follow, as a consequence, that such contract could operate no effect, and the party contracting with the infant would be discharged from it, as well as the infant: but there are numberless cases to prove that the party contracting with the infant cannot avail himself of the infancy. *Smith* v. *Bowin*, 1 Mod. 25. *Holt* v. *Clarencieux*, Stra. 937. *Clayton* v. *Ashdown*, 9 Vin. Ab. 393, 394. It would also follow, as a further consequence, that no such contract could by any subsequent circumstance, acquire validity; nam quod ab

initio non valet in tractu temporis non convalescet; whereas there are many cases of contracts, which, in their origin, could not be considered as beneficial to the infant, which have been allowed by the subsequent confirmation of the infant. *Southerton* v. *Whitlock*, Str. 690. As where an infant borrowed a sum of money, for which he gave a bond, and then devised his personal estate for payment of his debts, particularly those he had set his hand to, the bond was decreed to be paid, notwithstanding the minority of the obligor. *Hampson* v. *Lady Sydenham*, Nelson's Ch. Rep. 55. See also notes to ch. 2. s. 13. But "if this bond had been void at law, no new agreement would have made it better, the original corruption would have infected it throughout." P. Lord Hardwicke, *Chesterfield* v. *Janssen*, 1 Atk. 354. Lord Raymond, in the case of *Holt* v. *Clarencieux*, states the rule to be, that where the contract may be for the benefit of the infant, or to his prejudice, the law so far protects him, as to give him an opportunity to consider it when he comes of age, and it is good or voidable at his election.—In the case of *Zouch* v. *Parsons*, the court of King's Bench adopted the distinction taken by Perkins, (section 12.) "that all such gifts, grants, or deeds, made by infants, which do not take effect by delivery of his hand, are void; but all gifts, grants, or deeds, made by infants, by matter, in deed, or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate." Upon which Lord Mansfield observes, that the words "which do take effect," are an essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power, and convey no interest." As an infant is not capable by law of binding his real estate by any conveyance, it becomes necessary that he should have

a day to shew cause against any decree, which requires him to join in a conveyance of the inheritance, yet he is bound by a decree of sale of his estate. *Booth* v. *Rich.* 1 Vern. 295. *Cook* v. *Parsons,* 2 Vern. 429. And in the case of *Lord Brook* v. *Lord and Lady Hereford,* 2 P. Wms. 518, *Mould* v. *Williamson,* 2 Cox's R. 386, it was held, that an infant, when plaintiff, was as much bound and as little privileged as one of full age; and so Lord Hardwicke held, in *Gregory* v. *Molesworth,* 3 Atk. 626, unless gross laches, or fraud and collusion, appear in the prochein amy; and then the infant might open it by a new bill. An infant may also be relieved against a slip by his counsel in mispleading. *Savage* v. *Whitbread,* 3 Ch. Rep. 14, 3d ed. Sir *John Napier* v. *Lady Effingham,* 2 P. Wms. 401. *Fountain* v. *Cane,* 1 P. Wms. 504. *Bennett* v. *Lee,* 2 Atk. 531; or may put in a new answer. *Fountain* v. *Caine,* 1 P. Wms. 504; and may have such decree as his case requires, though not particularly prayed by his bill. *Stapleton* v. *Stapleton,* 1 Atk. 6. But, except in these cases, or by special order of the court, an infant is bound by decree. *Whitchurch* v. *Whitchurch,* 9 Mod. 128. And in the case of a decree of foreclosure, though he have six months to shew cause against it, after he attains his age; yet he is not to ravel into the accounts, nor entitled to redeem, but merely entitled to shew error in the decree. *Mallack* v. *Galton,* 3 P. Wms. 352. *Line* v. *Willis,* Rolls, 13th May, 1730. *Bp. of Winchester* v. *Beavor,* 3 Ves. jun. 317. But for the reversal of a decree, an infant may prefer a bill of review, though upwards of twenty years have intervened. *Lytton* v. *Lytton,* 4 Bro. 441.

SECTION V.

BUT an infant may be an executor (1), and of consequence may be charged for what he does as executor, according to law (*c*), because the law enables him; and

(1) Godolphin, 103. Went. Office of Executor, 214. 5 Rep. 27. 6 Rep. 67. 2 Bla. Com. 503.

(*c*) But if an infant be appointed executor, administration must be granted to his guardian, or next friend, durante minori ætate, which administration was, at common law, determined by the infant executor's attaining 17. *Pigot's* case, 5 Rep. 29. a. But, by the 38 Geo. III. c. 87, such administration is continued until the infant attains the age of 21. And before he attains such age, he cannot assent to a legacy. *Prince's* case, 5 Rep. 29. b; and, even then, his assent will not bind him, unless he have assets for debts. *Chamberlain* v. *Chamberlain*, 1 Ch. Ca. 257. Yet, though an infant may administer, it is said that he cannot commit a devastavit till 21. *Whitmore* v. *Weld*, 1 Vern. 326; which appears extraordinary, considering that an infant may dispose of his own estate at 17, or 15, if proved to be of discretion. *Bishop* v. *Sharp*, 2 Vern. 469. An infant may also be a trustee. *Jevon* v. *Bush*, 1 Vern. 342; and by 7 Anne, c. 19, an infant is, as trustee or mortgagee, enabled to convey the estates he holds in trust or mortgage, though the estate be abroad. *Ex parte Rosser*, 2 Bro. 365. And though beneficially interested in the mortgage money; *ex parte Bellamy*, 2 Cox's R. 422. But where an infant is a trustee to a charitable use and has any duty to perform, he is not within the statutes, *Attorney-General* v. *Pomfret*, 2

if he does any thing to which he is compellable by law, it is good, and will bind him (2). And although a fine or recovery

(2) Co. Litt. 172. a.

Cox's Rep. 221. But the master must report to whom he is to convey. *Winnington* v. *Foley*, 1 P. Wms. 538. *Anon.* Pre. Ch. 284. *Ex parte Brook*, 16 March 1793, Rolls; which power (though formerly doubted, 3 Atk. 164,) has been construed to authorize him to convey by common recovery: *ex parte Johnson*, 3 Atk. 558, *ex parte Smith*, Ambler's Rep. 624; and if the infant trustee be also a feme covert, the court may direct her to convey by fine: *ex parte Maire*, 3 Atk. 479. *Anon.* Comyn's Rep. 615; but the infant must be an express and purely a trustee, and the trust in writing, and not a merely constructive trust: *ex parte Vernon*, 2 P. Wms. 549. *Godwyn* v. *Lister*, 3 P. Wms. 387. *Hawkins* v. *Obeen*, 2 Ves. 559. Where the trust does not appear in writing the proceedings should be by bill and not by petition, 2 P. Wms. 549. And by 29 G. II. c. 31, infants may surrender leases in the court of Chancery, in order to renew them. An infant may also present to a vacant benefice, of which he is patron; Co. Litt. 89. a. 172. a. because a presentation is not a thing of profit, of which a guardian can make any benefit. *Hearle* v. *Greenbank*, 3 Atk. 710. Mr. Hargrave, in his edition of Coke upon Littleton, (note 1. p. 89. a.) very properly observes, that though the decision of Lord King, in the case of *Arthington* v. *Coverley*, 2 Eq. Ca. Ab. 518, "may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen, whether the want of discretion would induce a court of equity to controul the exercise, where a presentation is obtained from an infant, without the concurrence of the guardian." These

is never taken from an infant (3), for it is against the duty and office of the judge and commissioners, if they know of it; yet, if it be taken, and not reversed, during

(3) 2 Roll's Ab. 15. 2 Bulstrode, 320. 2 Ventr. 30. 3 Lev. 36.

several instances of infants being allowed to act, clearly fall within the rule laid down by Lord Mansfield, in the case of *Zouch* v. *Parsons*, that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to execute, are binding. It remains, however, to observe, that, in the case of *Hollingshed* v. *Hollingshed*, cited in 2 P. Wms. 229, and in Stra. 604, tenant in tail, empowered to make a jointure, so as such jointure did not exceed a moiety of the estate, was held to have executed the power by a covenant, during his infancy, with his wife's relations, that he would, within six months after he came of age, settle so much of the land as should amount to 100 *l.* per annum upon his then intended wife for life. This covenant clearly affected his interest, yet was held binding, perhaps, from the nature of the power, which, being to settle lands in jointure, implied the right of executing it during infancy; for, as he might contract marriage during infancy; to which dower was incidental, if he had not been allowed to execute the power, by making the jointure in lieu of dower, previous to the marriage, the power afterwards might have been a mere nullity. This case, however, seems to have escaped the attention of Lord Hardwicke, he observing, that "there is no precedent, either in a court of law or equity, where it has been held, a power over real estate, executed by an infant, is good." 3 Atk. 710. See also *Jackson* v. *Jackson*, 4 Bro. Ch. Rep. 462, in which *Hollingshed* v. *Hollingshed* is observed upon.

his minority, it is unavoidable. And there is no way to vacate it at law, because his age is triable only by inspection (*d*); and

(*d*) It appears from the rolls of parliament, 50 Ed. III. No. 127, vol. 2. p. 434, that the commons, considering this rule of law as a great hardship, petitioned that infants might be allowed a certain time, after they attained their full age, to reverse the fines which they had levied during their infancy; to which petition the king answered, that he would consider whether it would be proper to alter the old law in this point, or not. No alteration, however, has taken place, from an apprehension, that many inconveniences might result from avoiding records by bare averments. But, if the person of an infant be inspected by the judges, and it is once recorded that he is within age, although the infant should die, or attain his full age, before the fine is reversed, yet he or his heirs may reverse it at any time afterwards. Mo. 844. Co. Litt. 131. a. So, if an infant suffer a common recovery, in which he appears by attorney, he may reverse it at any time, after he has attained his full age, *Zouch* v. *Mitchell*, Godb. 161; as it may be tried by a jury, whether he was an infant, or not, when he appointed an attorney. The reason of which, Mr. Cruise observes, is, because an infant is not presumed to have sufficient understanding to choose a proper person as his attorney, and the law will not put it in his power to hurt himself; for if he is deceived and prejudiced by the recovery, he can have no remedy against his attorney. Cruise upon Recoveries, 145. And this is agreeable to the distinction taken by Lord Mansfield, in the case of *Zouch* v. *Parsons*:—"if an infant is permitted to suffer a common recovery he must make a tenant to the præcipe by feoffment, and give

no man would be sure of his inheritance, if records might be avoided by averments (4). However, sometimes recoveries (*e*) have been admitted upon privy seals, upon the petitions of fathers upon the marriage of their sons (5), but now it is but rarely suffered, on account of the mischiefs it

(4) 12 Rep. 122. 2 Inst. 483.

(5) Blunt's case, Hob. 196. 1 Vern. 461.

livery of seisin in person, by which means the feoffment is only voidable; whereas, if the infant appointed an attorney to give livery of seisin for him, the feoffment then would be absolutely void." It may be proper to observe, that not only fines and recoveries, but all other matters of record, not avoided by an infant during his minority, are binding. Co. Litt. 380. b. 2 Inst. 483. As, if an infant acknowledge a recognizance, statute merchant, or statute staple, or obligation, in the nature of a statute staple, or enrol an obligation, in all these cases he must avoid it in an audità querela during his minority; but if an infant bargain and sell lands, which are, in the realty by deed, indented and enrolled, he may avoid it when he will, for the deed was of no effect to raise an use. 2 Inst. 673. And as a fine, or recovery, not avoided by an infant during his minority, cannot be afterwards set aside, so neither shall the declaration of the uses, 2 Rep. 58. a. 10 Rep. 42. b.

(*e*) Though a recovery might be suffered by an infant, by the king's special directions, yet a fine could not be taken from him. *Sir H. Mackworth*'s case, 1 Vern. 461. The practice of applying for a privy seal has been for some time discontinued, private acts of parliament being found, in every particular, more suitable to the purpose.

occasioned (6). But certain it is, they may be charged for trespasses which are vi et armis; and so, it seems, in trover, because a tort (7). And although they are not capable of doing any injury knowingly, it is sufficient that they are the physical cause of a damage they had no right to do. The law of England makes a difference, therefore, between crimes and trespasses; and, in the one, considers the intent, but, in the other, only the damage done (*e*). For the obligation to restitution arises from the thing itself, and natural equity; but punishments are for the example, and to deter others. Neither did the court ever pretend to change the nature of infants' estates (*f*),

(6) *Sir John St. Alban's* case, 2 Salk. 567.

(7) *Smally* v. *Smally*, 1 Eq. Ca. Ab 6. Trin. 1780. But see Siderfin, 258. 9 Vin. Ab. 395. (H. 2.)

(*e*) See Lord Erskine's Vindication of the Rights of Juries, in which this distinction is most luminously considered, and incontrovertibly established.

(*f*) It seems admited, in the case of *Lord Winchelsea* v. *Norcliffe*, 1 Vern. 435, that the nature of an infant's estate may be changed by the decree of the court; and in *Inword* v. *Twyne*, Ambler's Rep. 417; 2 Eden's R. 148, the Chancellor not only recognized the right of the court, but further observed, that he thought guardians and trustees might change the nature of an infant's estate, where it is manifestly for the interest of the infant. And in *Palmer* v. *Danby*, Pre. Ch. 137, the court held that, the guardian might, without the direction of the court, pay the interest of any real incumbrance, an l

or to make that absolute which was defeasible. So that where an estate is given to

the principal of a mortgage, because that is a direct and immediate charge upon the land, but not upon any other real incumbrance. Guardian of an infant tenant in tail must keep down the interest of a mortgage. *Amesbury* v. *Brown*, 1 Ves. 480; because the infant cannot bar the remainders, unless by privy seal. As to maintenance for an infant, see B. 2. p. 2. c. 2. s. 1. The question, as to the power of a trustee to change the nature of the infant's estate, arising in *Vernon* v. *Vernon*, Ch. Nov. 1789, Lord Chancellor Thurlow stated it to be a general rule, that a trustee should not ad libitum change the nature of an infant's estate; (see *Gibson* v. *Scudamore*, Dick. 45. *Walker* v. *Wetherell*, 6 Ves. 473.) but held that the trustees, in that case, having applied the personal estate of the infant in performance or satisfaction of a condition, upon which the infant was entitled to a real estate, was not a ground for raising a trust against the heir, in favour of the personal representative of the infant. That guardian of infant tenant in tail shall not be restrained from cutting timber, see Forrest. Rep. 16. The cases of *Tullit* v. *Tullit*, Ambler's Rep. 370; and *Mason* v. *Mason*, in 1724, recognized in *Tullit* v. *Tullit*, lay down another distinction upon this subject, namely, that where the guardian of an infant tenant in tail cuts down timber, the money produced by the sale of it shall be considered as personal estate; but if the infant be tenant in fee, the money shall be considered as real estate. But in *Ashburton* v. *Ashburton*, 6 Ves. 6, the Chancellor directed lands purchased with the savings of an infant's estate, to be conveyed to the infant and his personal representatives until he attained 21, because, as personal estate, he might dispose of it by will at 17.

an infant upon a condition (g), such acts as an infant can perform, must be done by him, and infancy, in such case, is no excuse (8).

(8) *Whittingham's* case, 8 Rep. 44. b. 3 Bulstr. 59. *Williams* v. *Fry*, 2 Lev. 21. 1 Ventr. 199. 1 Ch. Ca. 131. *Falkland* v. *Bertie*, 2 Vern. 333. 343. *Scott* v. *Haughton*, 2 Vern. 560.

(g) In *Whittingham's* case, 8 Rep. 44, the diversities are taken by Lord Coke, betwixt conditions in fact that are expressed, as to pay money, or to do or not to do some particular act, and conditions in law that are implied, and which are distinguishable as conditions by the common law and by statute; and conditions by the common law, he observes, are of two sorts, one founded on skill and confidence, the other not: and conditions by statute are also of two qualities, *scil.* when the statute for execution of the condition in law gives recovery, and when the statute gives an entry, and no recovery. As to the condition in law, founded on skill and confidence, as a stewardship in fee, if the condition be broken, the infant is barred for ever; not so where the condition in law is not founded on skill and confidence, as where the infant or feme covert be lessee for life, and makes a feoffment in fee, and the lessor enters for the forfeiture; yet it shall not bar the infant or feme covert, after the death of her husband. But if an infant or feme covert commit waste, it shall bind the infant and feme covert, for the statute gives the action to recover the land; but if the condition be by force of a statute, which gives an entry, but no action, as in case of an alienation in mortmain, the infant or feme covert is not barred by the entry for the condition broken. See also Co. Litt. 233. b.

SECTION VI.

As for feme coverts, the law is much the same with respect to their power of contracting, as of infants (*h*); for they have

(*h*) The disability of infants to contract is in respect of the imbecility of their years. The disability of married women proceeds upon the consideration, that if they were allowed to bind themselves, the law, having vested their property in their husbands, they would be liable to engagements, without the means to answer them: and if they were allowed to bind their husbands, they might, by the abuse of such a power, involve their husbands and families in ruin. To guard against such consequences, the law considers all acts of the wife which might prejudice the interest of the husband, as void, except debts contracted by the wife for necessaries, with which the husband is bound to supply her, and on failure of which, she may contract, so as to bind him; but it seems, that at law she cannot borrow money to lay out in necessaries, but at the peril of the lender, who must lay it out for her. *Earl* v. *Peale*, Salk. 387; though, in equity, it is sufficient to charge the husband, if the money be actually applied to the purpose for which it was borrowed, though the lender neglect to see to the application. *Harris* v. *Lee*, 1 P. Wms. 483. Pre. Ch. 502. A wife may, without her husband, execute a naked authority, whether given before or after marriage. Co. Litt. 112. a. Hargrave's ed. n. 6. *Peacock* v. *Monk*, 2 Ves. 191. *Godolphin* v. *Godolphin*, 1 Ves. 21. So where both an interest and

(1) Co. Litt. 112. a.
(2) Cod. 12. 1 Cod. 8. 56. 6. 1 Domat. tit. 2. s. 1. p. 18.

no will, but the will of their husbands (1); though, in the Roman law (2), it was other-

an authority pass to the wife, if the authority be collateral to, and does not flow from the interest; because then the two are as unconnected, as if they were vested in different persons. *Gibbons* v. *Moulton*, Finch's Rep. 346. And as a feme covert may, without her husband, convey lands, in mere execution of a power or authority, so may she, with equal effect, in performance of a condition, where land is vested in her on condition to convey to others. Sir W. Jones, 137, 138. And these acts she may do, upon the ground already stated, that her husband cannot be prejudiced by such acts, and prejudice might arise to others, if his concurrence should be essential. It seems doubtful, however, whether she can convey lands which she holds as trustee, without her husband joining in such conveyance. *Daniel* v. *Ubley*, Sir William Jones, 138. And Mr. Hargrave thinks this distinction between a trust and a power or condition may be thus accounted for: "trusts being properly the subjects of consideration for courts of equity only, and though, in them, the legal estate is made subservient to the trust, yet courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trusts." Hargrave's Co. Litt. 112. a. n. 6. Another reason for this distinction may be drawn from the consideration, that if a married woman were allowed to convey a trust estate, without her husband's concurrence, she might convey it before the several objects of the trust were satisfied, for which he might jointly with her be responsible to the cestuis que trust: a reason which does not apply to the mere

wise (*i*). And in this, equity follows the law (*k*). For the husband's goods are

•execution of a power, or performance of a condition; but which extending to the case of a feme covert named executrix, led to the opinion, that she cannot, without the assent of her husband, take upon herself the execution of the will. Went. Office of Executor, p. 202, cites 2 H. VII. 15. *Thrustout* v. *Coppin*, 2 Bla. Rep. 801, an opinion, upon which it might be difficult to proceed; as in the spiritual court, she certainly might prove the will, and do all other acts respecting it, without the concurrence of her husband; and there is no instance of a prohibition being in such case granted, to restrain the proceedings in the spiritual court. See Wentworth, 202. But though the husband do assent to her acting as executrix, she cannot release her testator's debts; "for," says Wentworth, "if the wife's gift or release should stand good, her act might exceedingly endanger the husband, and make his goods liable to the creditors, the testator's estate being wasted by the gift or releases of the wife." Office of Executor, 206. And so it was held in Russel's case, 5 Rep. 27. But whatever doubt may exist as to the wife's right to probate from the ecclesiastical court without the consent of her husband, it seems that he may obtain it in her name without her consent, but in such case she will not be liable to a devastavit. *Beynon* v. *Gollins*, 2 Bro. Ch. Rep. 324, and after his death she may renounce. Ibid. In what particulars the disability of a married woman differs from that of an infant, see 9 Vin. Ab. 407. (I. 3.)

(*i*) Our ecclesiastical courts, proceeding in general according to the civil law, allow the wife to sue and

looked upon, with respect to the wife, as if they were in abeyance, or custody of the

to be sued without her husband; and will compel the husband to provide her with money for the purpose of any suit which she may have instituted in their courts against him; but it seems that the husband may relase whatever she recovers; for the marriage continues, and whatever accrues to the wife during coverture, belongs to the husband. *Chamberlain* v. *Hewitson*, Lord Raym. 73. 1 Salk. 115.

(*k*) Though courts of equity recognize the rule of law, which considers husband and wife as one person, and their interests as the same, yet there are cases in which equity will treat their interests as distinct and separate, and will allow the husband to sue the wife. *Brooks* v. *Brooks*, Pre. Ch. 24. *Sir Richard Moore* v. *Lady Moore*, 1 Atkyns' Rep. 272; or the wife to set up claims adverse to those of her husband, and which she may prosecute by a suit, instituted in the name of her prochein amy, or next friend. *Kirk* v. *Clark*, Pre. Ch. 275. *Lampert* v. *Lampert*, 1 Ves. jun. 21, as where any thing is given to the separate use of the wife. *Griffith* v. *Hood*, 2 Ves. 452; or the husband refuse to perform marriage articles. *Oxenden* v. *Oxenden*, 2 Vern. 493; or to perform articles for a separate maintenance, *Angier* v. *Angier*, Gilb. Rep. 152; and it is no answer to such suit, that the wife has been guilty even of adultery. *Sidney* v. *Sidney*, 3 P. Wms. 269. *Blount* v. *Winter*, 19th July 1781. But in most cases, where the wife comes into equity to be supported in her possession independent of her husband, and separate from him, or is allowed to sue without him, it is her merit that entitles her to relief, P. Lord

law, and to be charged only by act of law. And if she elope (3), she loses the privilege

(3) *Morris* v. *Martin*, Strange, 647. *Child* v. *Hardyman*, Stra. 875.

Hardwicke, *Hunt* v. *Hunt*, MSS. 2d May 1739; and therefore the court will not decree maintenance, where there is full proof of elopement and adultery: P. Lord Hardwicke, *Watkyns* v. *Watkyns*, 2 Atk. 96. But see *Ball* v. *Montgomery*, 4 Bro. Ch. Rep. 339; still less will equity assist her against any legal claim of a divorce for adultery. See *Shute* v. *Shute*, Pre. Ch. 111. But unless such impropriety be imputed and proved, equity will consult and provide for the claims of the wife; and with such view it may be laid down as a general rule, that courts of equity, considering the husband bound in conscience to make a settlement upon his wife at least adequate to her fortune, will not part with her fortune, unless he do make a proper settlement, or the wife in court being apprized of the amount of the fund; (*Edwards* v. *Townshend*, Anstr. 93;) and there being proof of there having been no previous articles of settlement, consent to his receiving it, or being abroad give her consent to commissioners. *Bourdillon* v. *Adair*, 3 Bro. Rep. 237. *Ex parte Purvis*, 12th Jan. 1793. *Shipton* v. *Hampson*, Finch's Rep. 145. *Milner* v. *Colmer*, 2 P. Wms. 639. *Adams* v. *Pearce*, 3 P. Wms. 12. *Harrison* v. *Buckle*, Stra. 238. *Brown* v. *Elton*, 3 P. Wms. 205. *Attorney General* v. *Whorewood*, 1 Ves. 538. *Sleech* v. *Thoringdon*, 2 Ves. 560. And if he refuse to make such settlement, the court will order the interest to accumulate for the benefit of his wife, unless he is starving for want of maintenance. *Bond* v. *Simmons*, 3 Atk. 20. and *Atherton* v. *Noel*, 1 Cox's Rep. 229; in which case the court allowed maintenance for his wife and her child out of his fund. See

of charging him even for necessaries (*l*), as at common law she lost her dower (4) (*m*). But it is certain, that a wife may have a

(4) Co. Litt. 32 a. See also *Shute* v. *Shute*, Pre. Ch. 112.

also *Armstrong* v. *Elveridge*, 8th August 1791. And in *ex parte Higham*, 2 Ves. 579, Lord Hardwicke appears to have refused to order the whole of the wife's fortune to be paid to the husband, though she was in court, and desired it might. See also *Blackwood* v. *Morris*, cited Forrester, 43, to the same effect. *Anon.* 2 Ves. 672; but in this case there were articles. But see *Butler* v. *Duncombe*, 2 Vern. 762. *Dimmock* v. *Atkinson*, 3 Bro. Ch. Rep. 195. *Wright* v. *Rutter*, 2 Ves. jun. 677. And in *Willetts* v. *Cay*, 2 Atk. 67; the Master of the Rolls is reported to have ordered the wife's whole fortune to be paid to the husband, though insolvent, the wife being in court, and giving her consent. See also *Frederick* v. *Hartwell*, 1 Cox's Rep. 193. *Macarmic* v. *Buller*, 1 Cox's Rep. 357. But see *Durand* v. *Durand*, 2 Cox's Rep. 207. How such consent is to be given, if the wife do not personally appear, see 2 Bro. C. R. 663; 3 Bro. Ch. R. 237; 3 Ves. 321.

In *Scriven* v. *Tapley*, Ambl. 509, this equity is said to be personal to the wife; and that if she die in the life-time of her husband, though she leave children, her husband is entitled to her personal property, without making any provision for them. And in *Lloyd* v. *Williams*, 1 Maddock's Rep. 456, this doctrine is confirmed, notwithstanding the dicta to the contrary in *Rowe* v. *Jackson*, Dick. 604; *Murray* v. *Lord Elibank*, 10 Ves. 84.

That a fund being decreed to be secured, for the benefit of the wife and her issue, till the husband made a settlement, shall belong to her if she survive her

separate estate from her husband, as by agreement, before or after marriage (*n*);

husband, though there be issue of the marriage. See *Phipps* v. *Earl of Anglesey*, 22d Nov. 1738, MS. *Rowe* v. *Jackson*, Dickins, 604. But, that though the wife survive her husband, if a decree be actually made, and the fund be in court, in order to enforce a provision for the wife, the husband's representatives are entitled to it, upon the death of the wife without children, for it was absolutely vested in him by law. See *Packer* v. *Wyndham*. Pre. Cha. 418; *Forbes* v. *Phipps*, Eden's Rep. 502. But see *Wytham* v. *Cawthorn*, 1 Eq. Ca. Ab. 392, pl. 1, contra. And so much is this equity of the wife to be favoured, that even the claims of creditors shall not prevail against it. *Jewson* v. *Moulson*, 2 Atk. 417; and if in consideration of the husband making a settlement, the trustees have possessed him of his wife's fortune, equity will support the settlement, though made after marriage and impeached by creditors, *Moore* v. *Rycault*, Pre. Ch. 22. *Anon.* Pre. Ch. 101. 520. *Hinton* v. *Scott*, Mosely, 336. *Middlecome* v. *Marlow*, 2 Atk. 519. *Cappodoce* v. *Peckham*, 4th May 1792, Ch. *Dundas* v. *Dutens*, 1 Ves. jun. 196; 2 Cox's Rep. 235. But see *Spurgeon* v. *Collyer*, 1 Eden's Rep. 62; *Randall* v. *Morris*, 12 Ves. 74. In which cases it was held, that a settlement, after marriage, of the wife's property, in consideration of a parol agreement before, was merely voluntary as against creditors. The wife's equity shall also prevail against the assignees of the husband, he being a bankrupt. *Jacobson* v. *Williams*, 1 P. Wms. 382. *Worrall* v. *Marlar*, stated in a note in Mr. Cox's edition, 1 P. Wms. 459. *Oswald* v. *Probert*, 2 Ves. jun. 685. So also against the husband's assignees for payment of debts; *Prior* v. *Hill*, 4 Bro. Ch. R. 139;

or by decree, for ill usage or alimony (*n*); or otherwise secured in trustees' hands for

and, in some late cases, it has been held by the Master of the Rolls, against the authority of *Povey* v. *Brown*, Pre. Ch. 325; Gilb. Rep. 80; and the observation made by Lord C. Thurlow, in *Worrall* v. *Marlar*, that "he did not find it any where decided, that if the husband make an actual assignment by contract for a valuable consideration, that the assignee should be bound to make any provision for the wife out of the property assigned," that the assignee of the husband, though for a valuable consideration, must take, subject to the equity of the wife. *Pope* v. *Crashaw*, 4 Bro. Ch. Rep. 326. See also *Like* v. *Beresford*, 3 Ves. jun. 506, which case involved circumstances so peculiarly favourable to the claims of the assignee, the money being advanced for the maintenance of the husband and wife, that if any case could affect the general equity of the wife, the claims of the assignee must have prevailed.

As to the adequacy of the settlement, see *Lacey* v. *D. of Athol*, 2 Atk. 448. *Beresford* v. *Hobson*, 1 Mad. Rep. 362. As to property accruing to the wife, she having a settlement, see *Dance* v. *Dennison*, 6 Ves. 385. *Mitford* v. *Mitford*, 9 Ves. 87.

The anxiety of courts of equity to protect the claim of the wife to an adequate settlement out of her own property, has induced them not only to enforce it, when the husband seeks their aid, but to restrain the husband from suing, in the Ecclesiastical Court, for the wife's portion arising out of personal estate; because that court cannot enforce the equity of the wife. See Pre. Ch. 548. *Jewson* v. *Moulson*, 2 Atk. 420. *Tanfield* v. *Davenport*, Toth. 114. 1 Stra. 238, 503. And upon

her (*o*). And as to these, she is in nature of a feme sole (5), and may sue, or be

(5) *Gorges* v. *Chancey*, Tothill, 97. 1 Chan. Ca. 118. *Bletsow* v. *Sawyer*, 1 Vern. 244. *Allen* v. *Passworth*, 1 Ves. 163. *Hearle* v. *Greenbank*, 1 Ves. 298. *Grigby* v. *Cox*, *Peacock* v. *Monk*, 2 Ves. 190. *Hulme* v. *Tenant*, 1 Brown's Rep. 16.

the same principle, courts of law have held that an action for a legacy will not lie; *Dicks* v. *Strutt*, 6 Term Rep. 690; and the husband has been restrained from assigning the wife's reversionary interest; *Ellis* v. *Ellis*, 7th March 1793, Ch. But, notwithstanding these determinations, it is said, that courts of equity will not, in general, interpose in prejudice of the husband's legal right, if he can make such right available without resorting to a court of equity. *Milner* v. *Colmer*, 2 P. Wms. 641. *Attorney General* v. *Whorewood*, 1 Ves. 538. *Bosvil* v. *Brandon*, 1 P. Wms. 459. But see Pre. Ch. 548. *Jewson* v. *Moulson*, 2 Atk. 420. *Tanfield* v. *Davenport*, Toth. 114. *Lady Elibank* v. *Mantolieu*, 5 Ves. 37. *Holland* v. *Prosser*, 1st November, 1802. *Ellis* v. *Ellis*. *Gardner* v. *Walker*, 1 Str. 504. Bunb. 86. 1 Atk. 192, 280. 2 Ves. 680. 3 Ves. 411. 5 Ves. 507.

It may be proper to observe, that though the husband, by the marriage, adopts the wife and her circumstances together, and is liable to her then debts, 3 Mod. 186, yet he is liable to them only during the coverture, unless the creditor recover judgment against him in the life-time of the wife. *Powell* v. *Bell*, Pre. Ch. 255. *Sanderson* v. *Crouch*, 2 Vern. 118. *Jorden* v. *Foly*, Sel. Ca. Ch. 19. Nor can a court of equity make him liable, in respect of the fortune which he may have had with her. *Earl of Thomond* v. *Earl of Suffolk*, 1 P. Wms. 461. *Heard* v. *Stamford*, 3 P. Wms. 410, Forrester 173. But see *Ball* v. *Smith*, 2 Freem. 231. But if the husband take out administration, he will be,

sued, without her husband (*p*); and they are not in the power of her husband, but in her own disposal, and the produce of

as administrator, liable to the extent of what he receives as her assets. *Heard* v. *Stamford*, Forrester, 172. Q. Whether the husband would, in such a case, be liable, if he had made a settlement of his own estate, in consideration of her fortune; it having been held, that by such settlement, he must be considered as a purchaser of his wife's fortune, though the same consist of merely choses in action? *Cleland* v. *Cleland*, Pre. Ch. 63. *Meredith* v. *Wynn*, Pre. Ch. 312. Finch's ed. and cases there cited, 3 P. Wms. 199. n. *Blois* v. *Lady Hereford*, 2 Vern. 502. See also *Archer* v. *Pope*, 2 Ves. 523. But in *Salwey* v. *Salwey*, Ambler's Rep. 692, it was held, that there must be an express agreement, to entitle the husband to the wife's choses in action, or chattels; and so it seems to have been held in *Heaton* v. *Hassel*, M. 6 G. I. ch. 4 Vin. Ab. 40. tit. Baron and Feme, D. in a note, and in *Rudyard* v. *Neirin*, Pre. Ch. 209. 2 Freem. 262. See also *Lister* v. *Lister*, 2 Vern. 68.

(*l*) Sed qu. Whether notice to the tradesman trusting her for necessaries be not necessary, if she merely withdraw herself, and afterwards offer to return, and the husband refuse to receive her again? *Child* v. *Hardyman*, Stra. 875. In the case of *Manby* v. *Scott*, which is best reported in 1 Ba. Ab. 295, it is observable, that the husband had prohibited several persons to trust his wife, she having left him without his consent, and, amongst others, he had expressly prohibited the plaintiff; on which the court held, that the presumption of the husband's consent to the contract,

them (6), in nature of a will (*q*), and are liable to her debts (7). And if she has a separate maintenance (*r*), and lives separate;

(6) *Fettiplace* v. *Gorge*, 3 Bro. C. R. 8. *Gore* v. *Knight*, 2 Vern. 535. Pre. Ch. 255.

Herbert v. *Herbert*, Pre. Ch. 44. 1 Vern. 326. *Norton* v. *Turville*, 2 P. Wms. 144.

(7) *Kenge* v. *Delaval*,

which in many cases, may be implied, was wholly repelled. That the husband is not liable for necessaries after adultery, see *Gower* v. *Hancock*, 6 Term Rep. 603.

It may be deserving of consideration, whether the husband having possessed himself of his wife's fortune, shall be discharged from her debts for necessaries, if it appear that she withdrew in consequence of his harsh and cruel conduct towards her. I am aware that it may be said, the spiritual court would, under such circumstances, decree her alimony; but there are considerations of delicacy which might controul such an application, and it seems hard that fair creditors should suffer by the influence of such considerations.

(*m*) But articles to settle lands, being in nature of an actual jointure, are not forfeited by an elopement, &c. as is dower. *Sydney* v. *Sydney*, 3 P. Wms. 275. *Blount* v. *Winter*, 9 July 1781, cited in a note by Mr. Cox.

(*n*) Sir William Blackstone, 1 Com. 442, observes, that it is generally true, that all compacts made between husband and wife, when single, are void by the intermarriage, and refers to Cro. Car. 551, in which case it was agreed, that if a feme obligee take one of the obligors to husband, that it is a discharge to the other co-obligors. The reason of this decision is within the distinction, which ought to qualify the rule, for the

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and this known to tradesmen, they cannot trust her, and recover of the husband at law (8). Yet, while the marriage continues, the living separate does not destroy the legal rights of the husband (*s*).

(8) *Todd* v. *Stokes*, 1 Salk. 116. Lord Raym. 444. *Angier* v. *Angier*. Pre. Ch. 409. *Hatchet* v. *Baddeley*, 2 Bla. Rep. 1079. *Manby* v. *Scott*, 1 Lev. 4, best reported in 1 Bacon's Abr. 295.

debt was due at the time of the marriage, and being due, the husband might have paid it, but payment to his wife would be like transferring it from one hand to the other; and, therefore, as the debt would exist during the coverture, if allowed to exist at all, the marriage shall, at law, extinguish the debt. *Cage* v. *Acton*, 1 Lord Raym. 515. But where the agreement be such as cannot create a debt, or raise a demand during the coverture, the marriage shall not extinguish the agreement. *Smith* v. *Stafford*, Hob. 216. *Clark* v. *Thompson*, Cro. Jac. 571. *Tylley* v. *Pierce*, Cro. Car. 376. Lady d'Arcy's case, 1 Ch. Ca. 21, and Pridgeon's case, 1 Ch. Ca. 117, in which the distinction is taken by Hale, Chief Baron. *Melbourne* v. *Ewart*, 5 Term Rep. 381. But though courts of equity admit a debt in præsenti, or which might arise during the coverture, to be extinguished at law by the marriage, upon the notion, that husband and wife are but one person in law, and cannot sue each other, yet, as they may sue each other in equity, a bond, or other security, though void at law, shall be sustained in equity, at least as evidence of an agreement. *Cannel* v. *Buckle*, 2 P. Wms. 243. *Acton* v. *Pearce*, 2 Vern. 480. *Watkyns* v. *Watkyns*, 2 Atk. 97. See also *Cotton* v. *Cotton*, Pre. Ch. 41. Dick. 140. And if a wife charge her estate with payment of her husband's debts, or apply her separate estate to such purpose, and it does not appear to have been in-

tended by her as a gift to her husband, equity will decree the husband's assets to be applied in exoneration of her estate, or in repayment of the money advanced, *Huntingdon* v. *Huntingdon*, 2 Vern. 347. 1 Bro. P. C. 1. *Pocock* v. *Lee*, 2 Vern. 604. *Tate* v. *Austin*, 1 P. Wms. 264. 2 Vern. 689. *Parteriche* v. *Pawlett*, 2 Atk. 384. See also *Clinton* v. *Hooper*, 3 Bro. Ch. Rep. 201. *Astley* v. *E. of Tankerville*, 3 Bro. Ch. Rep. 545. See *Innis* v. *Jackson*, 16 Ves. 366.

As to agreements by the husband after marriage, by which the wife claims a separate estate, it was formerly understood, that the wife must take, through the medium of trustees, or others, and not immediately from her husband; for, unless by particular custom, as by the custom of York, (Fitz. Prescription. 61. Bro. Custom, 56,) a feme covert is incapable of taking any thing of the gift of her husband, Co. Lit. 3. except by will; Littleton, s. 168. See also *Moyse* v. *Gyles*, 2 Vern. 385. *Beard* v. *Beard*. 3 Atk. 72. As to surrender by copyholder to the use of his wife, see 4 Co. 29. b. As to grant by the lord to his wife, see 2 Wils. 254. But in *Lucas* v. *Lucas*, 1 Atk. 270, Lord Hardwicke observed, that, in equity, gifts between husband and wife had been often supported, though the law does not allow the property to pass; and in *Pawlett* v. *Delavel*, 2 Ves. 666, his Lordship entered very particularly into the question, and supported the transaction; but in *Milnes* v. *Busk*, 2 Ves. jun. 498, Lord C. Loughborough is stated to have referred that determination to the particular circumstances of the case, and to have expressed a doubt whether a feme covert is to be considered, in respect of her separate property, as a feme sole quoad her husband in transactions between them. But see *Slanning* v. *Style*, 3 P. Wms. 334, and *Calmady* v. *Cal-*

mady, there cited. *Bletsow* v. *Sawyer*, 1 Vern. 245. *Moore* v. *Freeman*, Bunb. 205. *Mitchell* v. *Mitchell*, 15 and 18 July, 1712, Exch. cited in *Moore* v. *Freeman*. See also *Bell* v. *Hyde*, Pre. Ch. 328. Gilb. Rep. 83. *Pybus* v. *Smith*, 3 Bro. Ch. Rep. 340. *Ellis* v. *Atkinson*, 3 Bro. Ch. Rep. 565. *Carr* v. *Eastbrook*, Rolls, 2 May 1793. *Wood* v. *Watham*, 2 May 1793. *Frederick* v. *Hartwell*, 1 Cox's Rep. 193. The cases to which Lord Hardwicke seems to have adverted, as cases in which the court could not support such gifts, are where the allowance of them would prejudice creditors; *Slanning* v. *Style*, and where the gift is of the whole of the husband's estate. *Beard* v. *Beard*, 3 Atk. 72. But though the wife may take a separate estate from her husband, and even have a decree against her husband in respect of such estate; see *Cecil* v. *Juxon*, 1 Atk. 278, or avail herself of a charge for payment of his debts; *Offley* v. *Offley*, Pre. Ch. 26; yet it may be material to remark, that if she do not demand the produce during his life-time, and he maintains her, that an account of such separate estate shall not be carried back beyond the year. *Powell* v. *Hankey*, 2 P. Wms. 82. *Thomas* v. *Bennet*, 2 P. Wms. 341. *Fowler* v. *Fowler*, 3 P. Wms. 355. *Lord Townsend* v. *Wyndham*, 2 Ves. 7. *Peacock* v. *Monk*, 2 Ves. 190. *Blagrave* v. *Blagrave*, Mich. Term. 1789. *Squire* v. *Dean*, 4 Bro. C. R. 326. *Smith* v. *Lord Camelford*, 2 Ves. jun. 716. *Christmas* v. *Christmas*, Sel. Ca. Ch. 20. *Dalbiac* v. *Dalbiac*, 16 Ves. 126. *Parkes* v. *White*, 11 Ves. 225. This rule, however, proceeds on the notion of the wife's consent; if therefore, she does in her husband's life-time, demand such account, and he promises to pay whatever is due to her, she shall be allowed to come upon her husband's estate, as a creditor, for the amount. *Ridout* v. *Lewis*, 1 Atk. 269. See also *Countess of Warwick* v. *Edwards*, 1 Eq. Ca. Ab. 140. pl. 7.

But though agreements after marriage bind the husband, (*qa.* an agreement to live separate, see *Wilkes* v. *Wilkes*, Dick. 791. *Legard* v. *Johnson*, 3 Ves. 352,) yet their validity, as against creditors or purchasers, must depend upon the sufficiency of the consideration which led to them; for, if merely voluntary, and accompanied with any circumstances from which a fraudulent design may be inferred, they shall not be allowed to prevail against creditors, nor against purchasers. See c. 4. s. 12, 13. where the effect of voluntary conveyances is more fully considered, with reference to the statutes 13 and 27 Elizabeth.

(*n*) There certainly are cases in which the court of Chancery has decreed alimony to the wife; but, whether the decrees proceeded upon a previous divorce in the ecclesiastical court, or upon an agreement between the parties, in many of the cases, does not appear. *Lashbrook* v. *Tyler*, 1 Ch. Rep. 24. *Ashton* v. *Ashton*, 1 Ch. Rep. 87. *Russell* v. *Bodwill*, 1 Ch. Rep. 99. *Whorewood* v. *Whorewood*, 1 Ch. Rep. 118. 1 Ch. Ca. 250. But it is observable, that all these cases, except *Lasbrook* v. *Tyler*, were during the time of the troubles, when commissioners were appointed, to whom jurisdiction was expressly given, and whose decrees were held to be confirmed by the act for the confirmation of judicial proceedings; *Head* v. *Head*, 3 Atk. 548. 1 Ch. Rep. 118. In *Nichols* v. *Danvers*, 2 Vern. 761, proceedings had been had against the husband, (as appears from the register's book, though not noticed in Mr. Vernon's Report, 2 V. 671,) in the ecclesiastical court, propter sævitiam; and in *Oxenden* v. *Oxenden*, 2 Vern. 493, it appears from Gilbert's Report of the same case, that there had actually been a divorce, propter sævitiam; and in *Angier* v. *Angier*, Gilb. 152, there was an agreement. But in *Williams* v. *Callow*, 2 Vern. 752, the court

certainly does appear to have decreed the wife a separate maintenance out of a trust fund, on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce, or agreement that the fund in dispute should be so applied. And in *Watkyns* v. *Watkyns*, 2 Atk. 96, the husband having quitted the kingdom, Lord Hardwicke decreed the wife the interest of a trust fund till he should return, and maintain her as he ought. See also *Bullock* v. *Menzies*, 4 Ves. 798. Yet, in *Head* v. *Head*, 3 Atk. 547, Lord Hardwicke observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even then unwillingly; and this opinion of Lord Hardwicke appears most reconcileable with principle; for the case of a divorce, propter sævitiam, may be considered as an implied agreement; and if there be an express or implied agreement, there seems no doubt but that courts of equity may, concurrently with the spiritual court, in proceeding upon it, decree a separate maintenance. Wood's Institute, 62. *Sealing* v. *Crawley*, 2 Vern. 386. *Guth* v. *Guth*, 3 Bro. Ch. R. 614. *Hudson* v. *Hudson*, 19 Nov. 1712, S. P. *Stokes* v. *Stokes*, Rolls, E. T. 1 Ann. Or restrain the husband, by a ne exeat, from quitting the kingdom, to evade the payment of an agreed or decreed allowance. *Head* v. *Head*, 3 Atk. 295; Dick. 143. But see *Colgar* v. *Colgar*, 1 Ves. jun. 94; 11 Ves. 526. The spiritual court, however, would be, as to maintenance, the more proper jurisdiction, if it acted in rem. Lit. Rep. 78. 2 Comyn's Dig. 100; 2 Atk. 511. But if, after an agreement between husband and wife to live separate, they appear to have cohabited, equity will consider the agreement as waved by such subsequent cohabitation. *Fletcher* v. *Fletcher*, 2 Cox's Rep. 100. See *Rolfe* v. *Buddon*, Bunb. 187. *St. John* v. *St. John*, 13 Ves. 526. Or, if the agreement being in consequence of the

wife's elopement, the husband offer to take her again. *Mildmay* v. *Mildmay*, 1 Vern. 52. It is observable, that if courts of equity had an original and concurrent jurisdiction with the spiritual courts, it would have been unnecessary to have given the commissioners, during the troubles, such jurisdiction; and that the doubt which was entertained, 1 Ch. Rep. 118, could not have been raised, respecting the validity of their decrees, after the act confirming judicial proceedings. Besides, even in the spiritual court, they do not pretend to the right of decreeing alimony, but as incidental to a decree of divorce, and a decree of divorce or even of separation was never even suggested to be within the jurisdiction of a court of equity. *Wilkes* v. *Wilkes*, Dick. 791. But see *Yeo* v. *Yeo*, Dick. 498. *Ball* v. *Montgomery*, 2 Ves. jun. 191.

(*o*) Though it has never been doubted, but that a married woman may take and enjoy an estate, separate from, and independently of her husband, if trustees were interposed, yet it was formerly very much doubted whether she could take an estate to her separate use, unless trustees were interposed. *Harvey* v. *Harvey*, 1 P. Wms. 126. *Burton* v. *Pierpoint*, 2 P. Wms. 79. But in *Bennett* v. *Davis*, 2 P. Wms. 316, it was held, that where one devised lands in fee to his daughter, being a feme covert, for her separate use, without appointing any trustees, it should be a trust in the husband; for that there is no difference where a trust is created by act of the party, and where by act of law; and so it was decreed in *Rolfe* v. *Budder*, Bunb. 187. *Darly* v. *Darly*, 3 Atk. 399. And equity will not only raise a trust, where the object of the gift is to the separate use of the wife, but will also, from the nature of some gifts, infer them to be to the separate use of the wife. *Graham* v. *Londonderry*, 3 Atk. 393.

See *Lee* v. *Pricaux*, 3 Bro. Rep. 381. That a feme covert may dispose of her separate estate, if personal, see *Gore* v. *Knight*, Pre. Ch. 255. *Herbert* v. *Herbert*, Pre. Ch. 44. *Peacock* v. *Monk*, 2 Ves. 191. *Hearle* v. *Greenbank*, 1 Ves. 303. *Fettiplace* v. *Gorge*, 3 Bro. C. R. 8. *Hulme* v. *Tenant*, 1 Bro. Ch. R. 16. See also *Willat* v. *Cay*, 2 Atk. 16, and the cases referred to by Mr. Sanders, in his edition of Atkyn's Reports. Whether a feme covert may dispose of her separate property in favour of her husband, by a donation inter vivos, see *Moore* v. *Freeman*, 3 Bro. P. C. 378. *Milnes* v. *Busk*, 2 Ves. jun. 498, and *Whistler* v. *Newman*, 4 Ves. jun. 129, in which the cases upon this point are very ably observed upon. That a married woman cannot by her consent in court transfer to her husband property settled in trust for her, if she survived her husband, see *Richards* v. *Chambers*, 10 Ves. 580. But see *Spuling* v. *Rochfort*, 8 Ves. 164. And *Parkes* v. *White*, 11 Ves. 225. But it seems, if a woman, being possessed of a trust term to her separate use, should marry, that her interest therein, notwithstanding the trust, will vest in her husband jure mariti. *Sir Edward Turner*'s case, 1 Vern. 7. *Pitt* v. *Hunt*, 1 Vernon, 18. *Tudor* v. *Samyne*, 2 Vern. 270. *Bates* v. *Danby*, 2 Atk. 421. The authority of these cases is recognized by Lord Hardwicke, in *Jewson* v. *Moulson*, 2 Atk. 421; but it appears to be considerable weakened by the decision in *Lady Strathmore* v. *Bowes*, 2 Bro. Ch. Rep. 345; that a woman may, before her marriage, and without the privity of her intended husband, convey her property to trustees for her separate use, and that, by such conveyance, it is placed beyond the reach and controul of her husband, " for that a man, who marries without a treaty, must be content to take his wife as he finds her."—It will not, I trust, be considered a want

of that respect which is due to the high authorities who determined this case to observe, that as it does not appear immediately reconcileable with the other cases and opinions in the books, (*Carlton* v. *Earl of Dorset*, 2 Vern. 17. *Lance* v. *Norman*, 2 Ch. Rep. 41. *Howard* v. *Hooker*, 2 Ch. Rep. 42. *Poulton* v. *Wellington*, 2 P. Wms. 533. *King* v. *Cotton*, 2 P. Wms. 674. Draper's case, 2 Freeman, 29,) the particularity of its circumstances might have in some degree occasioned the difference of decision. As to the paraphernalia of the wife, see *Offley* v. *Offley*, Pre. Ch. 26. *Calmedy* v. *Calmedy*, 11 Vin. Ab. 181. pl. 21. *Northey* v. *Northey*, 2 Atk. 77. 1 Atk. 441. 3 Atk. 369. 2 Atk. 104.

(*p*) There are numberless cases, in which the wife has been allowed, through the medium of her prochein amy, to sue her husband, in respect of her separate property; but I have not been able to find any case, either at law or in equity, in which she has been allowed to sue or be sued by a stranger, merely in respect of her separate property, without her husband being plaintiff or defendant: if the husband be an exile, or has abjured the realm, then, indeed, she may sue, and is liable to be sued, as a feme sole, both at law and in equity. Co. Lit. 133. a. *Countess of Portland* v. *Prodgers*, 2 Vern. 104. *Deely* v. *Duchess of Mazarine*, Salk. 116. *Newsome* v. *Bowyer*, 3 P. Wms. 37; though she have no separate property; and in a court of equity, she may be proceeded against without her husband, if he be not within the jurisdiction of the court, and may be decreed to make good engagements which she has entered into respecting such property. *Norton* v. *Turvill*, 2 P. Wms. 144. *Bell* v. *Hyde*, Pre. Ch. 328. *Dubois* v. *Hole*, 2 Vern. 613; but in such

case, the most the court can do, is to call forth her separate property in the hands of her trustees, and to direct the application of it; for the court cannot make a personal decree against a feme covert for the payment of a debt. *Hulme* v. *Tenant*, 1 Bro. Ch. Rep. 16. *Standford* v. *Marshall*, 2 Atk. 68. *Sockett* v. *Wray*, 4 Bro. C. R. 483. *Nantes* v. *Corrock*, 9 Ves. 188. *Bulpin* v. *Clarke*, 17 Ves. 365. But see *Heatly* v. *Thomas*, 15 Ves. 603, as to the liability of the assets of a married woman. It may, however, be proper to observe that in the *D. of Bolton* v. *Williams*, Lord Loughborough said, that he should consider much before he would advance the remedy further against a married woman than the law gives it; 2 Ves. jun. 156; and in *Whistler* v. *Newman*, 4 Ves. jun. 129, his Lordship entered very fully into the consideration of the cases upon the subject, and concluded by observing, that though "where the creditor of the husband, or person dealing with the married woman, has got any legal hold of the fund, he must take it, yet if he has not any legal hold, I am much at a loss for any principle upon which this court can make his situation better, and improve a security which the law will not acknowledge. How far the law has gone in these cases, it is not necessary for me to determine upon; in some of the cases I have felt a degree of doubt that I have not been able to remove; but it is going a great way further than any reason of justice, much more of equity, will warrant, to extend that beyond any legal right that may have been got by the aid of a court of equity." See also *Mores* v. *Huish*, 5 Ves. 692. *Angel* v. *Haddon*, H. T. 1817. *Jones* v. *Harris*, 9 Ves. 486. But see *Parkes* v. *White*, 11 Ves. 225, in which case Ld. Eldon, C. expresses considerable doubt as to the general doctrine laid down by Lord Rosslyn, C. in *Whistler* v. *Newman*; and has, I think,

most materially weakened, if not overruled it. *Essex* v. *Atkins*, 14 Ves. 542.

In some modern cases it has, however, been held, that at law the wife living separate from her husband by articles of separation, and having a separate maintenance from him, secured to her by deed, is, in respect thereof, to be considered as a feme sole, and, as such may be sued without her husband, Lady Lanesborough's case, B. R. H. 23 Geo. III. *Barwell* v. *Brooks*, B. R. H. 24 Geo. III. *Corbett* v. *Poelnitz*, 1 Term Rep. 5. It might be construed a want of that respect which is due to the high authority of those who decided the above cases, even to question the principles upon which they proceeded; an imputation to which I should seriously lament having subjected myself, by any observation in the course of this work. It does appear to me, however, to be material to observe, that neither of the above cases, (though they are supposed to furnish at least a general rule of law,) adverts to the adequacy of the separate maintenance, nor to the circumstances of the husband at the time of securing it. As to the adequacy of the maintenance, it seems to be a material consideration; for, if the wife should, by the brutality or misconduct of her husband, or by collusion, be induced to accept of a sum not sufficient to maintain her, she might, by such acceptance, become chargeable to her parish: but the contracts of husband and wife shall not affect third persons, and the parish is interested in the husband's maintaining his wife. The decisions, however, are, that the husband is discharged of his liability, and that she is, as a feme sole; if so, it will follow that though a wife may gain a settlement in right of her husband, her husband may be discharged of his legal liability to provide her with necessaries, if she will consent to accept an allowance, though insuf-

ficient for her support. As to the circumstance of the husband's being indebted, at the time of the separation, it seems to be a point of considerable importance; for unless courts of law are prepared to determine, that a man indebted may, to the prejudice of his creditors, make a settlement on his wife, it must follow, that every settlement, or separate maintenance, made by a husband, in such circumstances, is liable to be set aside by the claim of creditors: so that the maintenance, in respect of which the wife is, according to such decisions, made personally liable, may be taken away by the subsequent claim of her husband's creditors. I am aware, that in the case of *Stephens* v. *Olive*, 2 Brown's Ch. Rep. 90, the creditors of the husband having instituted a suit to set aside such settlement, the Master of the Rolls held, that the covenant by the trustees to indemnify the husband against the wife's debts, was a valuable consideration; and, therefore, that the settlement, though made after the debt to the plaintiff was contracted, was good against him; and Lord Loughborough, in *King* v. *Brewer*, Chelmsford Assizes, decided to the same effect. To this clause, therefore, in general, may be referred the validity of the settlement against the claims of creditors; (I say, in general, for it has been said, that even without such clause, the husband is discharged from the debts of the wife, if he can show that he allows her a separate provision; and that the only material reason to introduce it is, that the husband may be protected against the costs which he may incur by being sued for such debts. *Angier* v. *Angier*, Gilb. Rep. 152.) But if the force, and operation of this clause be, as laid down in *Stephens* v. *Olive*, it would follow, that any agreement between husband and wife, securing her a separate maintenance, without such clause, might be set aside by creditors; unless it could be shewn, that the conduct of the husband had

been so harsh and cruel, as to afford the wife a sufficient ground for a sentence of alimony in the spiritual court, if the wife had sued him in such court; under which circumstances, it seems, a court of equity will sustain a conveyance by the husband of part of his estate, as a separate maintenance for his wife, even against the claims of creditors; see *Hobbs* v. *Hull*, 1 Cox's Rep. 445; but see *Beard* v. *Webb*, 2 Bosanq. Rep. 93. *Marshall* v. *Rutton*, 8 T. Rep. 545, which have materially weakened, if not destroyed, the authority of Lady Lanesborough's case, and *Barwell* v. *Brooks*.

As to wills of personal estate by feme covert, see *Ross* v. *Ewer*, 3 Atk. 160. *Henley* v. *Philips*, 2 Atk. 48. See *Sockett* v. *Wray*, 4 Bro. 483. *Gage* v. *Lister*, 1 Bro. P. C. 112. See *Stevens* v. *Bagwell*, 15 Ves. 153.

(*q*) Lord Hardwicke, in *Peacock* v. *Monk*, 2 Ves. 191, seems to have thought that this power of a feme covert over her separate estate must be confined to such part of it as was personal; for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had, before marriage, reserved to herself such right by way of trust, or of a power over an use; and doubted, whether a court of equity could carry into execution a bare agreement, to the prejudice of the heir at law. Upon which Lord Kenyon observes, in *Doe* v. *Staple*, 2 Term Reports, 684, that "what was then considered as a doubt, no longer remains so; for in *Wright* v. *Cadogan*, 6 Brown's P. Ch. 156, it was determined, that a court of equity would compel the heir to make a conveyance to the party, in whose favour such an agreement was made." See *Rippon* v. *Dawding*,

Ambler's Rep. 565. Not so as to issue in tail claiming per formam doni. *Hinton* v. *Hinton*, 2 Ves. 634. And in all those cases in which a feme covert has such power, she may exercise it without joining her trustees, unless their joining is made necessary. *Grigby* v. *Cox*, 1 Ves. 617. But if a power to dispose of her separate property by will, reserved to her by agreement, be by her executed before marriage, the marriage being a revocation of her will, her disposition of it cannot take effect. *Hodesden* v. *Lloyd*, 2 Bro. Ch. Rep. 534. But where a feme covert is empowered to make a writing, in nature of a will, a writing executed during the coverture will operate as such. *Cottor* v. *Layer*, 2 P. Wms. 624. *Oke* v. *Heath*, 1 Ves. 139. *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. 75. *Southby* v. *Stonehouse*, 2 Ves. 612. See *Ross* v. *Ewer*, 3 Atk. 160. *Henly* v. *Phillips*, 2 Atk. 48. *Socket* v. *Wray*, 4 Bro. Ch. Rep. 483. The power of femes coverts, under some circumstances, over their separate property, is thought, however, to have received an additional extent by the decision of the court of Common Pleas, in *Compton* v. *Collinson*, 1 Blackstone's Term Reports, Cases in C. P. 334, by which it was held, that a wife, having a copyhold estate to her separate use, and living separate from her husband, may surrender the same without her husband, the husband having, upon the separation, covenanted to join in all necessary conveyances of such estates, and to such uses as she should appoint. The power, in this case, certainly does not in terms enable her to dispose of the estate in any manner without her husband; but the husband's covenant is, that he will give effect to her appointment by joining in the necessary conveyances, and the court conceived his joining in the surrender was requisite, merely to support his interest in her estate.

(*r*) In the case of *Todd* v. *Stokes*, the husband appears to have allowed his wife a separate maintenance; yet the court did not in their decision proceed upon that circumstance, but upon the general reputation of the husband and wife being separated; from which it might be inferred, that if that circumstance had not made a part of the case, the other circumstance singly would not have been sufficient to discharge the husband. In the report of *Todd* v. *Stokes*, it is noted that Holt, Chief Justice, had, at Exeter Lent assizes, 10 W. III. in a cause between *Longworthy* v. *Hockmore*, (the authority of which is recognized in *Thompson* v. *Hervey*, 4 Burr. 2177,) held, that if a husband turn away his wife, and afterwards she takes up *necessaries*, upon credit, of a tradesman, the husband shall be liable to the tradesman to pay for them. But if the wife elopes, though the tradesman has no notice of the elopement, if he give credit to the wife, the husband is not liable. Upon which it may be remarked, that the wife might, in such case, have become chargeable to her parish, her husband being, by her elopement, discharged even from his liability to supply her with necessaries; but it is observable, that the husband, in such case, is not discharged by his own act or agreement, but by the wife's misconduct; (but see *Govier* v. *Hancock*, 6 T. Rep. 600; which is not the fact, where the discharge is in consequence of the husband's and wife's agreeing to live separate, in consideration of a separate maintenance secured to the wife. Where the husband is discharged from liability to his wife's debts, in respect of her having a separate maintenance, it seems, that it must be a provision proceeding from himself, and not from a third person. *Thompson* v. *Harvey*, 4 Burr. 2177.

(*s*) This opinion seems to be recognized in *Palmer* v. *Trevor*, 1 Vern. 261, the court, in that case, holding,

that payment to a wife of a legacy was not good payment though the wife lived separate from her husband; and, in Roll's Ab. 343. pl. 8, it is expressly laid down, that if husband and wife are divorced à mensâ et thoro, and a legacy is left to her, the husband may release it, for such divorce does not dissolve the marriage. See also 2 Roll's Ab. 301. pl. 11. *Stephens* v. *Totty*, Cro. Eliz. 908. But in an anonymous case, 9 Mod. 43, the husband, though divorced à mensâ et thoro, and though the wife had alimony, was restrained by injunction from selling a term which belonged to the wife. And in *Newsome* v. *Bowyer*, 3 P. Wms. 37, it was held, that the husband being attainted of felony, and pardoned on condition of transportation, and the wife becoming afterwards entitled to some personal estate, as orphan to a freeman of London, that it belonged to her, as a feme sole. As to the interest vested in the husband by the marriage, in the wife's real and personal estates, see 1 Inst. 299. b. 300. a. 351, 352, 353. note (1). Hargrave's edition.

SECTION VII.

Grotius de Jure Belli et Pacis, b. 2. c. 11. s. 9.

ANOTHER impediment of assent is ignorance and error (*t*), either in fact or in

(*t*) Non videntur qui errant consentire, is a general rule in the civil law; but, in its application, it is material to distinguish between error in circumstances which do not influence the contract, and error in circumstances which induce the contract. This distinction is very fully considered by Pothier Traité des Obligations, par. 1. c. 1. s. 1. art. 3. s. 1. a work to which I refer,

law (*v*). [c] And if the mistake be discovered before any step is taken towards perform-

as affording the best illustration of the principles and construction of contracts. See also Burlamaqui Principes du Droit naturel, c. 1. s. 82.

(*v*) There certainly are cases, in which the ignorance of any particular fact will be a ground of relief, even at law. Doctor and Student, Dia. 2. c. 47. As where money is paid by mistake, Buller's Ni. Pri. 131. 4to. ed. unless it be paid into court under a rule of court. *Malcolm* v. *Fullarton*, 2 Term Rep. 648. *Marriott* v. *Hampton*, 7 Term Rep. 269. But it must not be understood, that every kind of mistake is relievable in equity; for though equity will relieve against a plain mistake or misapprehension, as in Luxford's case, cited in *Gee* v. *Spencer*, 1 Vern. 32. 18 Vin. Ab. 370. *Milmay* v. *Hungerford*, 2 Vern. 243. *Bingham* v. *Bingham*, 1 Ves. 126. *Cocking* v. *Pratt*, 1 Ves. 400. *Pooley* v. *Ray*, 1 P. Wms. 355. *Willan* v. *Willan*, 16 Ves. 72; or against ignorance of title, as in *Tucker* v. *Searle*, 2 Ch. Rep. 91. *Turner* v. *Turner*, 2 Ch. Rep. 81. *Evans* v. *Llewellyn*, 2 Brown's Ch. Rep. 150; yet equity will not interpose, if the fact was from its nature doubtful, or at the time of the agreement, equally unknown to both parties, as in the case referred to by Lord Thurlow, in *Mortimer* v. *Gapper*, 1 Brown's Rep. 158: "a contract for a piece of ground, which was to be inclosed for 20*l.* and upon a bill for specific performance, the defence was, that it was worth 200*l.* and although the contract was to be performed in futuro, yet, neither party knowing the value, the Master of the Rolls decreed the performance." So, if an estate be described as containing a certain number of acres, or thereabouts; and the difference be a few acres, more or

ance, it is but just that he should have liberty to retract, at least by satisfying the less. Or, if there has been a long acquiescence under the mistake, and neither party aware of it. *Nicholls* v. *Leeson*, 3 Atk. 573. *Vaughan* v. *Thomas*, 1 Bro. 556. Neither will equity avoid an agreement entered into to prevent family disputes, though founded on mistake; *Frank* v. *Frank*, 1 Ch. Ca. 84; nor an agreement entered into to save the honour of the family; *Stapleton* v. *Stapleton*, 1 Atk. 10; see *Stockley* v. *Stockley*, 1 Ves. & B. 30. *Wycherly* v. *Wycherly*, 2 Eden's Rep. 175; nor will equity decree a forfeiture after an agreement, in which, if there be any mistake, it was the mistake of all the parties to it; *Pullen* v. *Ready*, 2 Atk. 592. *Malden* v. *Merril*, 2 Atk. 8. This doctrine is carried to a very considerable extent, in a case referred to in a note to *East* v. *Thornbury*, 3 P. Wms. 127, by which it seems to have been held, that a tenant who had paid an annuity charged on land, without deducting the proportion of the taxes to which such annuity was liable, and which the tenant had paid, could not recover back the same by a bill in equity. See *Bingham* v. *Bingham*, 1 Ves. 126. As to mistakes in framing deeds, they will be considered, c. 3. s. 11. See also *Uvedale* v. *Halfpenny*, 2 P. Wms. 151. It may, therefore, be sufficient, in this place, to observe, that they are relievable only in those cases in which express evidence can be adduced of the intention of the parties. *Henkle* v. *Royal Exchange Assurance*, 1 Ves. 317. *Langley* v. *Brown*, 2 Atk. 203. *Burt* v. *Barlow*, 3 Bro. Ch. Rep. 451. *Smith* v. *Maitland*, 1 Ves. jun. 362. *Seymour* v. *Fotherly*, 1 Vern. 320. As to mistakes in wills, see *Milner* v. *Milner*, 1 Ves. 106. *Hampshire* v. *Pearce*, 2 Ves. 216. *Bradwin* v. *Harpur*, Ambl. 374. *Dowsett* v. *Sweet*, Amb. 175. *Ulrich* v. *Lichfield*, 2 Atk. 372. *Del Mare* v. *Rebello*, 3 Bro. Ch. Rep. 446.

other of the damage that he has sustained by losing the bargain. But if the contract

Mellish v. *Mellish*, 4 Ves. 47. *Philips* v. *Chamberlayne*, 4 Ves. 51. *Campbell* v. *French*, 3 Ves. 321. *Brackenbury* v. *Brackenbury*, 2 Eden's Rep. 275; which cases fully establish the general rule, that, in the construction of wills, the apparent intention of the testator shall not only controul any expression inconsistent with it, but correct any mistake by which it would be endangered; for mistakes ought never to be presumed, if any construction agreeable to reason can be found out. *Purse* v. *Snaplin*, 1 Atk. 415. But see *Kennell* v. *Abbott*, 4 Ves. 802, where a testamentary disposition was induced by a misapprehension of the relation in which testator stood to the object of his bounty. As to latent ambiguities, and how far parol evidence is admissible to explain them, see Lord Bacon's Rules, R. 23. *Fonnereau* v. *Poyntz*, 1 Bro. Ch. Rep. 472, and the cases there cited. *Dowsett* v. *Sweet*, Amb. 175. *Bradwin* v. *Harpur*, Amb. 374. *Stebbing* v. *Walkey*, 2 Bro. Ch. Rep. 85. and *Spink* v. *Lewis*, 3 Bro. Ch. Rep. 355. *Thomas* v. *Thomas*, 6 Term R. 673. *Smith* v. *Coney*, 6 Ves. 42; and cases there referred to. As to ignorance of law, it may be laid down as a general proposition, that it shall not affect agreements, nor excuse from the legal consequences of particular acts, even in courts of equity; as, if two are bound to another, and the obligee release the one, not supposing that he thereby discharged the other, yet, as ignorantia juris non excusat, he could not be relieved thereupon in equity. *Harman* v. *Camm*, 4 Vin. Ab. 387. pl. 3; but see *Simpson* v. *Vaughan*, 2 Atk. 33. and *Lansdown* v. *Lansdown*, Mosely, 364. in which case it is said that this maxim of law, though it applies in criminal cases, does not hold in civil cases.

be wholly, or in part, performed, and no compensation can be given him, then it is absolutely binding, notwithstanding the error (*u*). Yet this is not to be understood, where there proves to be an error in the thing or subject for which he bargained; for then the business is null in itself, by the general rules of contracting, inasmuch as in all bargains, the matter about which they are concerned, and all the qualities of it, ought to be clearly understood, and without such distinct knowledge, the parties cannot be supposed to yield a full consent (*x*).

I have already observed, that equity will open settled accounts for error or fraud, and that errors of law in such accounts, may, when opened, be corrected.

(*u*) *Beverley* v. *Beverley*, 2 Vernon, 131, seems to have been decided on this ground; for, in that case, the release obtained by the son was not only founded in mistake, but was also fraudulent; yet, as it was the inducement to the son's marriage, the mother was held bound by it. *Teasdale* v. *Teasdale*, Sel. Ca. Ch. 59. S. P. but see *Dyer* v. *Dyer*, 2 Ch. Ca. 108.

(*x*) The writers upon natural law maintain, that an error about a thing, or about its quality, upon prospect of which a man is induced to come to any agreement, renders the agreement or bargain void; for in such case, a man is not conceived to have agreed absolutely, but upon supposal of the presence of such a thing or quality.

on which, as on an implied condition, his consent was founded, and therefore the thing or quality not appearing, the consent is understood to be null and ineffectual. Puffendorff's Law of Nature and Nations, b. 1. c. 3. s. 12; and the civil law seems, upon this principle, to have required the seller, in some cases, to declare the defects of the thing sold. Dig. lib. 21. tit. 1. l. 1. s. 1. Domat's Civil Law, book 1. tit. 2. s. 11. See Cicero de Officiis, lib. 3. c. 12, 13, 14, where this matter is very elaborately discussed. See also Heineccius Elem. J. N. and G. c. 13. s. 351. c. 14. s. 393. But the general rule of the common law of England is caveat emptor, upon which rule, it seems, that the vendor, without an express warranty, merely undertakes to make a good title to the vendee; to shew that the goods delivered are such as were contracted for, and that no deceit was practised to disguise their defects; and if provisions, that they were wholesome at the time of the delivery. 3 Bla. Com. 164, 165. See *Lowndes* v. *Lane*, 2 Cox's R. 363. If the warranty be express, an action will lie upon it to recover damages, unless the defect was apparent, and such as a common purchaser might have discovered at the time of the sale; ibid. It may be proper, however, to observe, that it is not every affirmation, on the part of the vendor, that will amount to a warranty; for though falsely affirming the goods to be his own, he being in possession of them, when they were the goods of another, will subject the vendor to an action upon the case, without charging him with knowingly having so falsely affirmed. *Crosse* v. *Gardner*, Carthew, 90. *Medina* v. *Stoughton*, 1 Salk. 210; yet if he affirm falsely of his right, when another has the possession of the subject, an action will not lie; *Rosswell* v. *Vaughan*, Cro. Jac. 196. Salk. 210, 211. Neither will an action lie upon a mere affirmation, if the vendor knew not of the defect at the time of the sale;

1 Comyn's Dig. 184; or that the quality of the thing was different from what he affirmed; *Chandler* v. *Lopus*, Cro. Jac. 4. 468. See c. 5. s. 8, note (*g*), note (*h*). It may, however, upon this point, be material to consider, whether the vendor of an article, in which he is a dealer, does not impliedly warrant the quality of the article to be suited to its general purposes. See Pothier Traité des Oblig. par. 1. c. 2. ant. s. 163.

SECTION VIII.

MUCH more ought a mistake to render a pact or agreement invalid, where accompanied with fraud and circumvention, if it were occasioned by one of the parties, who, by that means, drew the other into the engagement (1); for then he is undoubtedly bound to make restitution for the injury (*y*).

(1) Heineccius Elem. J. N. & G. c. 14. s. 394.

(*y*) For this species of injury, an action upon the case for the deceit will lie at law; Buller's Ni. Pri. 30; and, in equity, the fraud may be assigned as a reason for not completing such contracts as are executory, or for rescinding such as are executed; *Preston and Executors* v. *Wasey*, Pre. Ch. 76. *Young* v. *Clark*, Pre. Ch. 538. *Hick* v. *Phillips*, Pre. Ch. 575. Mr. Wentworth's case, 1 Freem. 302. *Jervis* v. *Duke*, 1 Vernon, 20. *Whorewood* v. *Simpson*, 2 Vernon, 186. *Broderick* v. *Broderick*, 1 P. Wms. 239. *Can* v. *Can*, 1 P. Wms. 727. *Lansdown* v. *Lansdown*, Mosely, 364. *Crull* v.

Yet the rigour of the common law would admit no averment by a man against his own deed (*z*), except in the king's case,

Dodson, 5 Vin. Ab. 507, 508. *Savage* v. *Taylor*, Forrester, 236. *Buxton* v. *Lister*, 3 Atk. 383. *Brereton* v. *Cooper*, 2 Bro. P. C. 535. *Shirley* v. *Stratton*, 1 Brown's Rep. 440. *Fox* v. *Macreth*, 2 Brown's Rep. 400.

(*z*) Though it may be true, as a general proposition, that the common law will not allow of averments of matter dehors a deed, yet it is certainly not to be adopted as an universal proposition; for there are numberless cases, even at law, in which a deed has been defeated by matter in pais; as where the consideration was usurious, *Bush* v. *Buckingham*, 2 Ventris, 80. or simoniacal; or for compounding a felony; Jones's case, 1 Leon. 203. or for suppressing evidence on a criminal prosecution; *Collins* v. *Blantern*, 2 Wilson, 341. or for the sale of an office; Fitzgibbon, 45. or money won at play. *Pope* v. *St. Leger*, 5 Mod. 3. or the defendant may go into evidence, to shew the real consideration to have been greater than that stated in the deed; *Rex* v. *Inhabitants of Scammorden*, 3 Term Rep. p. 474; and it is said that fraud or covin may be averred against any act whatsoever; Jenk. 254. pl. 45. But, in general, relief against deeds obtained by fraud or covin is sought in equity; vide ante, section 3, note (*c*). And equity will not only allow averments against the consideration, but will also admit parol evidence, to shew that the deed is framed upon a misconception of the intention of the parties; *Baker* v. *Paine*, 1 Ves. 456. *Eden* v. *Earl of Bute*, 7 Brown's P. C. 204. 445. *Jones* v. *Statham*, 3 Atk. 388. *Countess of Shelburne* v. *Earl of Inchiquin*, 1 Bro. Rep. 338. *Ramsbottom* v. *Gordon*,

who had favour shewn to him, because the public interest was bound up with his. But it is a constant rule in equity, that where there is either suppressio veri, or suggestio falsi, the release, or other deed, shall be avoided (1). As if a man should be informed by J. S. that J. N. wanted to be a purchaser, and the latter should declare, that J. N. should have a better pennyworth than another person; and upon this, he should article with J. S. for the sale of it, when this purchase was, in reality, for a stranger; equity would not carry such a contract into execution (*a*); though, without

(4) *Jarvis* v. *Duke*, 1 Vern. 20. *Broderick* v. *Broderick*, 1 P. Wms. 240. *Kirwan* v. *Blake*, 13 Vin. Ab. 552. pl. 9. 1 Freem. 302. c. 306.

1 Ves. & B. 168; or that it varies from the heads or articles, see c. 3. s. 11. *Simpson* v. *Vaughan*, 2 Atk. 33. Sander's Ed. and cases there cited, note (1). but see *Rich* v. *Jackson*, 4 Bro. Ch. Rep. 514.

(*a*) In the case of *Lord Irnham* v. *Child*, 1 Bro. Ch. Rep. 95, Lord Chancellor Thurlow is reported to have said, that he should be sorry to lay it down, that "a man treating with a third person, in trust for a second, whom he had refused to deal with, could therefore set the contract aside: no case has gone so far. *Philips* v. *Duke of Bucks* was upon a difference of price." It is certainly true, that the price in *Philips* v. *Duke of Bucks*, was materially affected by the notion, that the vendor was treating with a person whom he wished to serve; but still it seems, that the principle upon which the court went, was, that there had not been that good

doubt, J. N. might have sold it to J. S. the next day (2): and even a misapprehension of the party has been held a ground for this purpose (3). But it is not every surprise that will avoid a deed duly made; nor is it fitting; for it would occasion great uncertainty, and it would be impossible to fix what was meant by surprise; for a man may be said to be surprised in every action which is not done with so much discretion as it ought to be. But the surprise here intended must be accompanied with fraud and circumvention, and then it must be proved; for fraud is a thing odious in law (4), and never to be presumed (*b*). And

(2) *Philips* v. *D. of Bucks*, 1 Vernon, 227. *Twining* v. *Morrice*, 2 Bro. Rep. 326.

(3) *Gee* v. *Spencer*, 1 Vern. 32. *Mildmay* v. *Hungerford*, 2 Vern. 243.

(4) Bath and Montague's case, 3 Ch. Ca. 85. Grounds and Rudiments of Law and Equity, 125.

faith and open dealing, on the part of the plaintiff, which was requisite to sustain his claim to the extraordinary interference of the court. And the case of *Eyre* v. *Popham*, stated by Mr. Brown, in a note to his report of the above case of *Lord Irnham* v. *Child*, seems to have proceeded on the same principle. See *Davis* v. *Symonds*, 1 Cox's R. 407. See also Poth. p. 1. c. 1. s. 1. art. 3. s. 1. 19.

(*b*) In *Chesterfield* v. *Janssen*, 2 Ves. 155, Lord Hardwicke enumerates four species of fraud: 1st, Fraud arising from facts and circumstances of imposition, which is the plainest case; 2dly, Fraud may be apparent, from the intrinsic value and subject of the bargain

if the fraud proceed altogether from a stranger, we are left to our remedy against him (c); and it is to be looked upon, as to the parties, as a mistake or error only, and to be governed by the rules before laid down.

itself, such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest or fair man would accept, on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice: a third is that which may be presumed, from the circumstances and condition of the parties contracting; and this goes farther than the rule of law; which is, that fraud must be proved, not presumed: but it is wisely established in this court, to prevent taking surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience, as to take advantage of his ignorance; a fourth kind of fraud, his lordship observes, may be collected or inferred, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition, and deceit on the other persons, not parties to the fraudulent agreement.

(c) In such case, an action may be maintained at law, for the damage which the party has sustained by the misrepresentation or deceit. *Pasley* v. *Freeman*, 3 Term Rep. 51. But see *Haycraft* v. *Creasy*, 2 East Rep. 92. *Evans* v. *Bicknell*, 6 Ves. 174.

SECTION

SECTION IX.

BUT further; in all contracts purely chargeable (1), if there appear to be an inequality, although there was no deceit, and all the faults of the thing were exposed, yet, if the damage be considerable, the bargain ought to be made void. And this estimate of the damage is to be taken either from the exorbitance of the price (*d*), or the

(1) Grotius de Jure Belli et Pacis, l. 2. c. 12. s. 8, 9. Puff. L. of Nature and Nations, b. 5. c. 3, s. 1. Pothier Traitè des. Oblig. par. 1. c. 1. art. 3. s. 4.

(*d*) I have not been able to find a single case, in which it has been held that mere inadequacy of price is a ground for the court to annul an agreement, though executory, if the same appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. *Moth* v. *Atwood*, 5 Ves. 845. But see *Emery* v. *Was*, 5 Ves. 846. *Underhill* v. *Harwood*, 10 Ves. 209. In the case of *Keen* v. *Stukeley*, Gilb. Rep. 155, the court expressly held, that the exorbitancy of the price was not sufficient to discharge the defendant from the performance of his contract; the decree for a specific performance was, indeed, afterwards reversed, but not upon the ground of inadequacy of consideration, but because the plaintiff had not made out his title by the time stipulated. 2 Bro. P. C. 396. In *Willis* v. *Ternegan*, 2 Atk. 251, Lord Hardwicke held, that "it is not sufficient to set aside an agreement in equity, to suggest weakness and indiscretion in one of

poverty of the party injured (*e*); for no man should be a gainer by another's loss: but a small damage, even in the law of

the parties who has engaged in it; for, supposing it to be, in fact, a *very hard and unconscionable bargain*, if a person will enter into it with his eyes open, equity will not relieve him upon this footing, unless he can shew fraud. See also *Hobart* v. *Hobart*, 2 Ch. Ca. 159. *Floyer* v *Sherrard*, Ambler's Rep. p. 18. In *Gwynne* v. *Heaton*, 1 Bro. Ch. Rep. 9, Lord Thurlow observes, that "to set aside a conveyance, there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." And in *Spratley* v. *Griffith*, 3 Brown's Ch. Rep. 179, in a note to *Heathcote* v. *Paignon*, the Chief Baron assigned, as a ground for the decree, that there was "no case in which mere inadequacy of price, independent of other circumstances, had been held sufficient to set aside a contract." *Love* v. *Burchard*, 8 Ves. 133. *Westurn* v. *Russell*, 3 Ves. & B. 187. *Matthews* v. *Fearn*, 1 Cox's R. 278. *Copis* v. *Middleton*, 2 Madd. 430. *Coles* v. *Trecothick*, 9 Ves. 246. *Underhill* v. *Harwood*, 10 Ves. 219. *Collier* v. *Brown*, 1 Cox's Rep. 428. See also *Stephens* v. *Bateman*, 1 Bro. Ch. Rep. 22. *Henley* v. *Acton*, 2 Bro. Ch. R. 17. In addition to this concurrence of authority, a very strong argument in support of the rule may be drawn from those cases, in which losing bargains have been actually established and decreed. *City of London* v. *Richmond*, et al. 2 Vern. 423. *Wood* v *Fenwick*, 1 Eq. Ca. Ab. 170. *Nichols* v. *Gould*, 2 Ves. 422; and the case referred to by Lord Chancellor Thurlow, in *Mortimer* v. *Capper*, 1 Bro. Ch. Rep. 158. See also Domat's Civil Law, b. 1. tit. 2. s. 3. As to

nature, is not sufficient to break off a bargain, for the benefit of traffic and the ease of the magistrate (2).

(2) Domat's Civ. Law, b. 1. lit. 2. s. 9.

contracts for reversionary or expectant interests, see post, § 12, note (*k*). note (*d*).

(*e*) But though courts of equity will not relieve against agreements, merely on the ground of the consideration being inadequate; yet if there be "such inadequacy, as to shew that the person did not understand the bargain he made, or was so oppressed, that he was glad to make it, knowing its inadequacy, it will shew a command over him, which may amount to a fraud." P. Lord Thurlow, *Heathcote* v. *Paignon*, 9 Bro. Ch. Rep. 175; *Underhill* v. *Harwood*, 10 Ves. 209. *Wright* v. *Head*, Ass. 27 April 1736. *Edwards* v. *Heather*, Sel. Ca. ch. 3; and such appears to be the nature of the second species of fraud enumerated by Lord Hardwicke, in *Chesterfield* v. *Janssen*, 2 Ves. 155, and upon which the court seems to have proceeded, in *Clarkson* v. *Hanway*, 2 P. Wms. 203. *Herne* v. *Meers*, as stated in Mr. Brown's note, 2d vol. Ch. Rep. 176, 177. *Gartside* v. *Isherwood*, 1 Bro. Ch. Rep. 558.

SECTION X.

THE civil law fixed this at half the value of the highest price the thing was really worth (*f*), to be sold at the time of the contract (1); and some have wished the law so in England (2). But although the court of Chancery have no fixed rule, how many years purchase is a reasonable price of lands, because the iniquity of the bargain does not depend upon the price (*g*); for

(1) Cod. lib. 4. tit. 44. l. 2. 8.
(2) *Nott* v. *Hill*, 2 Ch. Ca. 120.

(*f*) This rule of the civil law seems, however, to have been confined to immovables. Domat's Civil Law, b. l. tit. 2. s. 9. 1. The same writer assigns a reason for the rule being so applied; that though "the principal engagement which the buyer is under to the seller, is that of humanity, and the law of nature, which obliges him not to take advantage of the necessitous condition of the seller, to buy the thing at too low a price; yet because of the difficulties of fixing the just price of things, and of the inconveniences, which would be too many, and too great, if all sales were annulled, in which the things were not sold at their just value, the laws connive at the injustice of buyers, with respect to the price of sales, except in the sale of lands, where the price given for them is less than the half of their just value." B. 1. tit. 2. s. 3. Query if this rule extended to sales by auction? See *White* v. *Damon*, 7 Ves. 30.

(*g*) That mere inadequacy of price is not a sufficient

what may be a reasonable price in one case may be unreasonable in another; yet it is a constant rule, that where the bargain is plainly iniquitous, and it is against conscience to insist upon it, as forty years purchase for lands, or an extravagant price for stock, as was given in the South-Sea year; equity cannot support it, for that would be to decree iniquity (*h*). So a release of an

ground to annul a contract, is, by this passage, admitted, and the reason very correctly assigned.

(*h*) The cases referred to by our author are, *Keen* v. *Stukeley*, before cited, and *Cudd* v. *Rutter*, 1 P. Wms. 570. *Capper* v. *Harris*, Bunb. 135; but neither of these appear apposite to his purpose; for the reversal of the decree, by the House of Lords, in *Keen* v. *Stukeley*, was upon a ground distinct from the question of fraud; and in *Cudd* v. *Rutter*, and in *Capper* v. *Harris*, the reason assigned, why the court ought not to interpose, was, that it was a case more proper for an action for damages, with which, if the plaintiff pleased, he might purchase stock, than for a decree for a specific performance, which might, from the nature of stock, be beneficial to the plaintiff one day, and prejudicial the next; see 5 Vin. Ab. 540, where the case is much more fully stated than in Peere Williams: see also *Dorison* v. *Westbrook*, 5 Vin. Ab. 540, pl. 22. It may, however be proper to observe, that in *Thomson* v. *Harcourt*, 2 Bro. P. C. 415, and *Gardner* v. *Pullen*, 2 Vern. 394, where such a contract was decreed; the party who had undertaken to transfer the stock was plaintiff, seeking relief against a penalty, in which he had bound

equity of redemption has been set aside, the court being satisfied, upon the proofs, that the value of the land was much greater than to make a satisfaction for the debts for which it was given (3).

(3) *Kirwin* v *Blake*, 13 Vin. Ab. 552.

himself for performance of his contract, and that a performance of it was the only ground upon which equity could relieve him. It is, however, certainly true, that courts of equity having "a discretionary power to carry contracts into execution, if it appears they are unfairly obtained, though not to such a degree as to set them aside, will not decree a performance, but will leave the plaintiff to his remedy at law." *Savage* v. *Taylor*, Forrester, 236. *Young* v. *Clark*, Pre. Ch. 538. *Barnardiston* v. *Lingood*, Barnard. Ch. Rep. 341. *Vaughan* v. *Thomas*, 1 Bro. Ch. Rep. 556. See also *Buxton* v. *Lister*, 3 Atk. 383.

SECTION XI.

But this rule seems to extend chiefly to such things as have some stated and settled price, for, in other cases, there is no reason; but as a beneficial bargain will be decreed in equity, so, if it happens to be a losing bargain (*i*), it ought to be equally

(*i*) Unless fraud be imputable. *Dean* v. *Roston*, Anstr. Rep. 64.

decreed (1). As, if a man take a lease of water-works, in order to let it out in shares, and make a profit of it, the assignee, in trust for those who bought shares, shall be compelled to pay the reserved rent, though it be above double the value of what it proves to be worth; for the contract is to be judged of as matters stood when it took effect. And so hazardous bargains, to be paid double or treble the value of what is at present advanced, after the death of the tenant for life; but if such tenant for life outlives the person to whom the money is lent, then the whole to be lost, are not to be set aside without circumstances (2); for there may be nothing ill in those bargains, the price, at the time, being the full value (3). And what after happens, as the death of the party upon whose death the estate was to fall, or the money to be paid, cannot make any difference (*j*).

(1) *City of London* v. *Richmond* and others, 2 Vern. 423. *Wood* v. *Fenwick*, 1 Eq. Ca. Ab. 170. *Nichols* v. *Gould*, 2 Ves. 422.

(2) *Chesterfield* v. *Jansen*, 1 Atk. 339. *Batty* v. *Lloyd*, 1 Vern. 141. *Small* v. *Fitzwilliam*, Pre. Ch. 102.

(3) *Cass* v. *Rudell*, 2 Vern. 280. *White* v. *Nutts*, 1 P. Wms. 61.

Ex parte Manning, 2 P. Wms. 410. *Mortimer* v. *Capper*, 1 Brown's Ch. R. 156, and *Baldwin* v. *Boulter*, there cited. *Henley* v. *Acton*, 2 Brown's Ch. Rep. 17. *Wharton* v. *May*, House of Lords, 1807, 5 Ves. 27.

(*j*) The case of *Pope* v. *Roots*, 7 Brown's Parl. Ca. 184, is certainly irreconcileable with the principle of the cases referred to in the margin: it is, however, a single case; (unless the dictum in *Stent* v. *Bailis* can be relied upon, 2 P. Wms. 220;) and its authority appears to have been fully considered in the subsequent

case of *Mortimer* v. *Capper*.—*James* v. *Owen*, E. T. 1733, MSS. appears to have proceeded upon a different ground: the plaintiff had agreed to present the defendant to the court of aldermen, and to resign the place of printer to the city of London in his favour, to which place certain fees and profits were then annexed, but which the court of aldermen intimated their intention to reduce: and, upon that ground, the defendant refused to perform his agreement. The court thought, that the object of the agreement being the then profits, which were not purely contingent, and the plaintiff not having actually surrendered, that the performance of the agreement ought not to be decreed. *Jackson* v. *Lever*, MSS. E. T. 1792, Ch. which was decided on another point, this subject was very much and ably discussed; the argument principally relied on by the plaintiff's counsel was, that if the contract was good in its creation, nothing subsequent ought to be allowed to affect it. The case of *Carter* v. *Carter*, Forrester, 271, was referred to, as particularly illustrative of this rule; see *Paine* v. *Meller*, 6 Ves. 349; see also Heineccius Elem. J. N. and G. c. 13. s. 353.

SECTION XII.

But an unconscionable bargain, as a purchase of security got from an heir in his father's life-time, is now usually avoided in equity; for he would justly forfeit the character of an honest man, who should

endeavour to make an advantage of this easy age (*k*), and enrich himself at the cost of those, who either could not foresee, or

(*k*) The principle upon which courts of equity, in these cases, proceed, is, that a person having a mere expectancy, *Peacock* v. *Evans*, 16 Ves. 512, or, according to later decisions, a remainder or reversionary interest, *Gowland* v. *Feria*, 17 Ves. 20, must necessarily contract on unequal terms; it therefore does not extend to those cases in which the remainder-man joins in the sale with him, or those who have estates in Possession. See *Wood* v. *Abry*, Vice Ch. M. T. 1818; and in the cases to which the principle applies, the age of the party is not material. *Osmond* v. *Fitzroy*, 3 P. Wms. 131. In *Wiseman* v. *Beake*, Mr. Wiseman was nearly 40 years of age, and a Proctor in the Commons; in *Curwyn* v. *Milner*, the heir was about 27 years of age; and in *Gwynne* v. *Heaton*, the plaintiff was 23 years of age; which, though not an advanced age, is beyond that which the law recognizes as the age of discretion. But the real object which the rule proposes being to restrain the anticipation of expectancies, which must, from its very nature, furnish to designing men, an opportunity to practise upon the inexperience or passions of a dissipated man. Its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment, which might otherwise regulate their dealings. *Smith* v. *Burrows*, 2 Vern. 346. *Proof* v. *Hines*, Forrester, 111. *Freeman* v. *Bishop*, 2 Atk. 39. *Brooks* v. *Gally*, 2 Atk. 34. *Peacock* v. *Evans*, 16 Ves. 512. But see *Dewes* v *Breadt*, Sel. Ca. Ch. 7. *Bowes* v. *Heaps*, 3 Ves. & B. 119: or whose confidence may have betrayed them to that undue influence which may grow out of particular relations, as between attorney and

do not rightly apprehend the loss: and so, in the Roman law (1), the lending money to heirs in their father's life-time was pro-

(1) Dig. lib. 14. tit. 6. Pothier Traitê des Obligations, par. 1. c. 1. s. 1. art. 3. s. 5. Puff. L. of Nature and Nations, b. 3. c. 6. s. 5.

client. *Walmsley* v. *Booth*, 2 Atk. 25. *Newman* v. *Payne*, 4 Bro. Ch. Rep. 350. *Draper's Company* v. *Davis*, 2 Atk. 295. *Gibson* v. *Jeyes*, 6 Ves. 266. *Harris* v. *Tremanchure*, 15 Ves. 34, 13 Ves. 136. 1 Cox's Rep. 112, 134. *Guardian and Ward, D. of Hamilton* v. *Mohun*, 1 P. Wms. 121. *Hylton* v. *Hylton*, 2 Ves. 547. *Parent and Child, Cocking* v. *Pratt*, 1 Ves. 400. But see *Kinchant* v. *Kinchant*, 1 Bro. R. C. 369. *Carpenter* v. *Heriot*, 1 Eden's Rep. 338; and cases referred to in note (*a*), p. 342. Trustee and cesty que trust, see *Coles* v. *Trecothick*, 9 Ves. 244. *Morse* v. *Ryal*, 12 Ves. 355. *Whitaker* v. *Whitacre*, Sel. Ca. Ch. 13. *Master and servant, Middleditch* v. *Sharland*, 5 Ves. 87. *Cole* v. *Gibson*, 1 Ves. 503. *Lord Hardwicke* v. *Vernon*, 4 Ves. 411. *Lord Abingdon* v. *Butler*, 2 Cox's R. 260; and see *Fox* v. *Macreth*, 2 Bro. Ch. Rep. 400, where the various cases upon this branch of equity are collected and referred to their respective principles. And it is upon this principle, as also upon that of public policy, that seamen dealing for their prize-money or wages, are considered entitled to as much favour and protection in equity, as young heirs, they being, as Sir Thomas Clarke observes, a "race of men, loose and unthinking, who will, almost for nothing, part with what they have acquired perhaps with their blood." *How* v. *Weldon*, 2 Ves. 516. *Baldwin* v. *Rochford*, 1 Wilson, 229, *Taylor* v. *Rochford*, 2 Ves. 281. How far such contracts allow of confirmation, see *Carpenter* v. *Heriot*, 1 Eden's R. 342, note (*a*).

hibited expressly (*l*). And although the money would have been lost, if the heir had died before the father, yet it being an unrighteous bargain in the beginning, for it is not likely he would have made it, but in expectation of an unreasonable advantage, it cannot be helped by matter ex post facto (2). And no differenee, whether it was for money lent, or wares taken up to sell again, as improvident heirs are used to do (3). But the difference seems to be, if the heir has no maintenance from the father, but was turned out upon unreasonable displeasure; there, perhaps, the bargain, if not

(2) *Nott* v. *Hill*, 2 Ch. Ca. 120. 1 Vern. 167. 271. 2 Vern. 27. *Berney* v. *Pitt*, 2 Vern. 14. *Wiseman* v. *Beake*, 2 Vern. 121. *Twisleton* v. *Griffith*, 1 P. Wms. 310. *Curwyn* v. *Milner*, cited in a note to *Cole* v. *Gibbons*, 3 P. Wms. 293. *Lord Chesterfield* v. *Janssen*, 2 Ves. 125. *Barnardiston*, v. *Lingwood*, Barnardiston, 341. *Gwynne* v. *Heaton*, 1 Brown's Ch. Rep. 1.

(3) *Waller* v. *Dolt*, 1 Ch. Ca. 276. *Bill* v. *Price*, 1 Vern. 467. *Lamplugh* v. *Smith*, 2 Vern. 78. *Whitley* v. *Price*, 2 Vern. 78. *Barker* v. *Vansommer*, 1 Bro. Ch. Rep. 149. *Hough* v. *Williams*, H. 1790, MSS.

(*l*) By the Macedonian Decree, so called from the name of the usurer who gave occasion to it, "all obligations of sons living under the paternal jurisdiction, contracted by the loan of money, were declared null, without any distinction. But if any creditor had lent money for a cause which was just and reasonable, and sufficient to support the equity of the obligation, it was, by a favourable interpretation of the decree of the senate, to be excepted from the general prohibition, according to the quality of the use to which the son put the money which he had borrowed." Domat's Civ. Law. b. 1. tit. 6. s. 4.

excessively beyond the proportion of such assurances shall stand (*m*), because it is not to supply the luxury and prodigality of the heir, but to keep him from starving. Yet, it must be confessed, that in former times Chancery did not interpose in these cases (4); but the reason was, because there was another court then that did, and this was the Star Chamber, which could not only relieve the plaintiff, but punish the defendant (*n*). And although that court

(4) *Nott* v. *Hill*, 2 Ch. Ca. 120. *Twistleton* v. *Griffith*, 1 P. Wms. 310. *Baugh* v. *Price*, 1 Wilson, 320.

(*m*) In *Gwynne* v. *Heaton*, Lord Thurlow was of opinion, that the circumstance of the heir not being provided for by the father was entitled to no weight whatever; nor have I found any case, in which such difference has been proceeded upon by the court; (unless the case of *Dews* v. *Brandt* can be so considered, Sel. Ca. Ch. 7.); and though it is stated, in Gilbert's History of Chancery, p. 291, as a material circumstance, yet it seems to have been disregarded in *Nott* v. *Hill*, *Twisleton* v. *Griffith*, *Baugh* v. *Price*; see margin (4).

(*n*) Sir William Blackstone observes, that "the just odium into which this tribunal had fallen, before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice, except such as, on account of their enormous oppression, are recorded in the histories of the times." It appears, however, that the jurisdiction of this court did not break in upon the jurisdiction of other courts, except in extraordinary cases; 4 Inst. 63. See also Reeves's History of the English Law, 4th vol. p. 146.

was abolished, for the abuse that was made of its power (5), yet there are many cases, in which we find the want of such a jurisdiction. For a man may now practise a notorious cheat, and and pay the fine set upon him by law, which, perhaps, will be 20*l.* or some such sum, and count all the rest as clear gains by his villany (*o*).

(5) 16 Car. I. c. 10.

(*o*) The action of deceit, in which the plaintiff may recover damages to the extent of the injury he has sustained, seems to furnish a very sufficient substitute for the abolished jurisdiction of the court of Star Chamber; and if further provisions were necessary to prevent fraud, they appear to be supplied by the jurisdiction of our courts of equity, which will not allow the party practising a fraud in any way to derive a benefit from it.

SECTION XIII.

Let us now examine more minutely the force of these fraudulent and unequal contracts; for it is certain, on the part of him who committed the fraud, they are irrevocable (*p*); and if he should require a nul-

(*p*) It is a maxim in equity, that "he who hath committed iniquity shall not have equity." Francis's

lity of the contract, such a demand, which is scandalous, ought not to be granted him (1). Nay, if such a fraudulent person come as plaintiff into a court of equity, to have what was really and bonâ fide lent, he shall not have it, because he has committed iniquity (2). But as to all others, a conveyance obtained by fraud, is the same as if no conveyance had been made (*q*); and therefore a contingent estate, absolutely destroyed by it, shall yet be set up in Chancery (3), as if it were still subsisting, and nothing had been done. And there are other covenants which may be avoided only by one side, as between a minor and

(1) *Small* v. *Brackley*, 2 Vern. 602. *Montefiori* v. *Montefiori*, 1 Bl. Rep. 363.

(2) *Rich* v. *Sydenham*, 1 Ch. Ca. 202; but see *Priestley* v. *Wilkinson*, 1 Ves. jun. 214.

(3) *Englefield*, v. *Englefield*, 1 Vern. 443. *Herne* v. *Herne*, Barnardiston, 433.

Maxims, Max. 2. But this must be understood, where such person is plaintiff; for if he be defendant, the court will not interpose, unless he receive from the other party that to which equity entitles him. In some cases, therefore, courts of equity, though they rescind the transaction, will give the defendant his costs. See *Peacock* v. *Evans*, 16 Ves. 518.

(*q*) Upon this principle, which implies the nullity of intention, Lord Thurlow appears to have proceeded in *Hawes* v. *Wyatt*, 3 Bro. Rep. 156, in whicl. he held, that a deed obtained by fraud was not a revocation of a will. As also in *Dixon* v. *Olmius*, in which case his lordship would not allow the defendant to take benefit from the want of the republication of a will which he had forcibly prevented. But see *Attorney General* v.

one of full age (4); nor is this inequality of the condition of the contractors unjust, for every one ought to know the state of him with whom he treats. Yet those who are not by nature incapable of contracting, but prohibited by some positive law, although they cannot legally be forced to stand to their engagements, yet, if they do perform them, they cannot afterwards be relieved (*r*), for there is a natural obliga-

(4) *Smith* v. *Bowin*, 1 Mod. 25. *Holt* v. *Clarencieux*, Stra. 937. *Clayton* v. *Ashdown*, 9 Vin. Ab. 393. See also 1 Roll. Ab. 729, (D.) *Farnham* v. *Atkyns*, 1 Sid. 446.

Vigors, 8 Ves. 283. That a deed so obtained cannot be allowed in part, though innocent persons be interested under it, see *Davidson* v. *Russell*, Dick. 761.

(*r*) In *Cole* v. *Gibbons*, 3 P. Wms. 294, Lord Talbot seems to recognize this rule, where the original contract is impeached, merely as being unreasonable. See also *Goodman* v. *Skute*, Pre. Ch. 266. But in *Bosanquet* v. *Dashwood*, Forrester, 38, he says, the court would decree money overpaid on an usurious contract to be accounted for, notwithstanding the agreement of the oppressed party to allow such payment. In this case, however, he observed, that the securities were not delivered up, and he would not say what he would have done if they had been; and upon this circumstance, the court, perhaps, relied, in *Smith* v. *Bunning*, 2 Vern. 392; in which case, not only the marriage brocage bond was decreed to be delivered up, but also a gratuity of 50 guineas to be refunded. See c. 4. s. 4. Lord Hardwicke, in *Chesterfield* v. *Janssen*, 2 Ves. 125. 1 Atk. 354, has brought together and classed all the cases upon the subject of confirmation, and the result seems to be,

tion, so far as they are not naturally unjust; as in the Roman law, if a son, under power of his father, pays what he has borrowed, to which, though of age, he was not obliged (5); and in catching bargains of young heirs, in our law, always where they are set aside for fraud, plaintiff must do equity to defendant, by paying what was really lent (6).

(5) 1 Domat's Civil Law, b. 4. tit. 6. 2. 23.

(6) *Waller* v. *Dolt*, 1 Ch. Ca. 276. *Hill* v. *Price*, 1 Vern. 467. *Baker* v. *Vansommer*, 1 Bro. Ch. Rep. 149. Francis's Maxims, Max. 1.

that if the original contract be illegal, as usurious, no subsequent agreement or confirmation by the party can give it validity. But if it be merely against conscience, then, if the party, being fully informed of all the circumstances of it, and of the objections to it, voluntarily comes to a new agreement, he thereby bars himself of that relief which he might otherwise have had in equity; not so, if the confirmation be a continuance of the original fraud or imposition; as in *Earl of Ardglass* v. *Muschamp*, 1 Vern. 75, 237. *Nott* v. *Hill*, 1 Vern. 167. *Berney* v. *Pitt*, 2 Vern. 14. *Twisleton* v. *Griffith*, 1 P. Wms. 310. *Curwyn* v. *Milner*, 3 P. Wms. 293. 19th June 1731, note (c). *Taylor* v. *Rochford*, 2 Ves. 281. *Brooks* v. *Gally*, 2 Atk. 34. *Cole* v. *Gibson*, 1 Ves. 506. *Crowe* v. *Ballard*, 1 Ves. 215. *Cockshott* v. *Bennett*, 2 Term Rep. 763. *Wood* v. *Dow*, 18 Ves. 120. But see *Coles* v. *Trecothick*, 9 Ves. 246. *Morce* v. *Royall*, 12 Ves. 364, as to the general doctrine of confirmation.

SECTION

SECTION XIV.

ALSO an obligation, that was at first invalid, may afterwards recover strength, by the intervention of some new cause, fit to create a right (1); and for this a full agreement is sufficient, though not expressed by any verbal signs, since others may do as well. So, at the common law, there was an implied as well as express confirmation; as by acceptance of rent, or the like (2); which was founded on this reason, that the law will never intend a wrong, if the act, by any construction may be made lawful (3). And he cannot receive the rent, or the like, under the contract, without a confirmation of it (*s*). But the acceptance of a collateral

(1) *Stiles* v. *Cowper*, 3 Atk. 693.

(2) Pennant's case, 3 Co. 65. Co. Litt. 295. b. 2 Comyns's Dig. 361.

(3) Co. Litt. 42. a.

(*s*) As where the wife, after the death of her husband, accepts rent, reserved upon a lease by her and her husband, that amounts to an agreement to the lease. 1 Comyn's Dig. 573. (S. 3) *Goodright* v. *Strahan*, Cowp. 201. q. *Drybutter* v. *Bartholomew*, 2 P. Wms. 127; or if the wife enter, and take the profits, that amounts to an agreement to the estate, made to her during coverture; 3 Co. 26, a. But see note (*v*). So if an infant after his full age, continue in possession of lands demised to him during his infancy, he thereby affirms the lease, and makes himself liable to the arrears of rent incurred during his infancy; 1 Roll's Ab. 731. (K.)

thing, or by a stranger to the contract, cannot be supported by any intendment. Nor can an implied confirmation work stronger than if it were express; as to make good a void estate, or one not commenced, or in esse (*t*). But in natural justice and equity, this is carried further than at law (*u*): and therefore, in Chancery, an agreement, though not binding against an infant, yet shall be decreed; the infant having received interest under it after he came of age (4). And so if he does not expressly signify his desire to be relieved,

(4) *Franklin* v. *Thornbury*, 1 Vernon, 132.

(*t*) As if a lessee, being an infant, take a new lease, to commence at a future day, this shall not be a surrender of the old lease, though the new lease was to commence at full age, and he then entered and claimed by this new lease; 1 Roll's Ab. 728. (B.) pl. 2. *Lloyd* v. *Gregory* Cro. Car. 402. Sir W. Jones, 405.

(*u*) "If an obligation be void at law, no new agreement can make it better; the original corruption will infect it throughout. But as bargains, that are not cognizable at law, are properly the subjects of consideration in equity, new agreements and new terms may confirm what might otherwise admit a question as to their fairness."—P. Lord Hardwicke, *Chesterfield* v. *Janssen*, 1 Atk. 354. See *Shirley* v. *Martin*, 14th Nov. 1779, in which case the court of Exchequer was of opinion that contracts avoided on reason of public inconvenience, would not admit of subsequent confirmation by the party.

when he has convenient means, it is to be presumed that he is willing to abide by it (5); as where a lease was made by an infant, and stood unquestioned, and the rent was received, by a person under no disability, for five years, this silence amounts to a confirmation (*v*); and, according to the civil law, the question must not only be moved in five years, but decided in ten.

(5) *Cecil* v. *Earl of Salisbury*, 2 Vernon, 224. *Smith* v. *Law*, 1 Atk. 489.

(*v*) This must be confined to leases which are only voidable; for leases which are absolutely void cannot be confirmed by the subsequent receipt of rent. See *Doe* v. *Butcher*, Dougl. 50, and *Goodright* v. *Humphreys*, there cited; but see *Stiles* v. *Cooper*, 3 Atk. 692, and note (*s*).

CHAP. III.

Of Testimony of Assent.

SECTION I.

WE are now come to our second division, which was the want of testimony of the assent. The usual signs of consent being words, we must inquire what words will make a covenant to be performed in specie. And here we may observe, that although a covenant is properly of a thing future or past: for if it be of a matter in præsenti, it vests an immediate property, and amounts to a gift or grant, the nature of which is to be executed immediately (1): yet even at law, whenever the intention of the parties can be collected out of a deed, for the doing or not doing a thing, covenant will lie. For a covenant is but an obligatory agreement of the parties by deed; and any words which shew the intent, are sufficient for this purpose (2). And therefore a covenant will lie on a bond (3), or the reddendum in a

(1) Plow. Com. 308. a.

(2) 2 Com. Dig. 444. (A. 2.) F. N. B. 145. a. Plow. Com. 140, a. 1 Ves. 516. *Brill* v. *Bar*, 1 Lev. 47. *Norris*'s case, Hard. 178. Cro. Car. 207.

(3) *Hill* v. *Carr*, 1 Ch. Ca. 294.

lease; for it proves an agreement (4). So whatsoever words amount to a grant, will make a lease (5); for where there is substance, the law will apply the words to the intent, though they sound differently (6). And the reason of this was, that chattels were of little value at the common law, when personal property was but small, as leases for above forty years (*a*) were not permitted (7). But for the passing the freehold and inheritance, there were always required apt words, or words tantamount. Yet, although at the common law it is said, that the law should rule the intent, and not the intent the law, where there is a good consideration, and no doubt of the intent, equity will relieve against the rigour of the law, and make the conveyance valid (*b*).

(4) 1 Roll's Ab. 519. pl. 10. *Giles* v. *Hooper*, Carth. 135.
(5) Co. Litt. 45. b.
(6) Plow. Com. 140.
(7) Co. Litt. 45. b. 46. a. *Wind* v. *Jekyll*, 1 P. Wms, 574.

(*a*) Lord Coke does not appear to have considered this as a general law, but merely as the ancient law, for many respects; and Sir William Blackstone, 2 Com. 142. observes, that if this law ever existed, it was soon antiquated; Mr. Madox's Collection of ancient instruments, referring to several leases for a longer term, of as early a date as the reign of Richard the Second.

(*b*) The maxim of law, verba intentioni debent inservire, secures to all deeds, and other instruments, a construction the most favourable, and as near the minds and apparent intent of the parties as the law

And this is agreeable with the rule of the civil law; for there no set form of words or

will allow; and it does not appear, from any case, that courts of equity have assumed to themselves, in the construction of deeds, &c. the right of giving to this maxim, in favour of the party's intent, a more extensive or liberal operation. For "rules of property, rules of evidence, and rules of interpretation, in both courts, are, or should be exactly the same: both ought to adopt the best, or both must cease to be courts of justice." 3 Bla. Com. 434. See *Doe* v. *Laming*, 2 Burr. 1108. 14 Vin. Ab. tit. Intent; therefore, in those cases in which courts of equity have given to certain words a construction different from that which they have received in a court of law, the difference of construction must be referred to the difference of the subject matter; which difference in the subject matter would have occasioned the same difference of construction, even in the same court. See Fearne's Essay on Cont. Rem. 220. 4th ed. where this subject is very elaborately considered. In the construction of articles, or under certain circumstances of deeds, with reference to articles, courts of equity will make the expression subservient to the evident intention of the parties, either by controlling the strict and ordinary sense of the words, or by supplying necessary words. See notes to sect. 2. and *Kentish* v. *Newman*, 1 P. Wms. 234. So, also, in cases of trust, *Targus* v. *Puget*, 2 Ves. 194. But if the agreement be executed, courts of equity are governed by the rules of construction which prevail at law; the liberality of which is particularly manifested in *Walker* v. *Hall*, 2 Lev. 213. *Coltman* v. *Senhouse*, 2 Lev. 255. *Crossing* v. *Scudamore*, 2 Lev. 9. *Osman* v. *Sheefe*, 3 Lev. 370. *Sleigh* v. *Metham*, 1 Lutw. 782. *Spalding* v. *Spald-*

of writing was required in contracts (8); but they were perfected by the bare assent of

(8) Cod. lib. 2. tit. 3, l. 17.

ing, Cro. Car. 185. *Adams* v. *Steer*, Cro. J. 210. *Lutwich* v. *Mitton*, Cro. J. 604. *Barker* v. *Real*, 2 Mod. 249. *Roe* v. *Tranmer*, 2 Wils. Rep. 75; where the subject is fully considered. See also Sheppard's Touchstone, 82, 83. See also *Hewitt* v. *Ireland*, 1 P. Wms. 426. *Hebblethwaite* v. *Cartwright*, Forrest. 31. But though courts of law, in the construction of deeds, &c. endeavour to effectuate the intent, by giving to the words the most liberal and favourable construction, yet they require a strict attention to those forms and ceremonies which are prescribed, as essential to the legal operation of certain instruments; and where such forms or ceremonies have been omitted, it becomes in certain cases necessary, as already observed, Ch. I. s. 7. to resort to a court of equity, for the purpose of supplying the want of them. It may, however, be proper to observe, that in such cases, equity does not relieve, by dispensing with the legal requisites, but by decreeing that to be done, which, when done, renders the conveyance good at law. There certainly, however, are some instances, in which courts of equity seem to dispense with legal requisites; but, upon examination, it will be found, in most of such instances, that they are peculiarly the subject of equitable jurisdiction, and therefore immediately liable to such rules as equity prescribes. Thus, when it was solemnly decided, that a common recovery, suffered by the cestuy que trust in tail in possession under the trustees, would be sufficient to bar all equitable remainders depending on such estate tail, although there was no legal tenant to the præcipe: Lord Nottingham, C. stated the grounds of his decree "to be natural justice, (which is the rule in Chancery,) and not

the parties. A fortiori, where the contract is good at law, equity will carry it into exe-

the niceties in law; and that there was no such thing as an estate tail of a trust, but that it is created by and subject to the rules of the court," *North* v. *Way*, 1 Vern. 13. *Boteler* v. *Allington*, 1 Bro. Rep. 72: see Collectanea Juridica, 214. And so strictly do courts of equity confine themselves within the reason of this decree, that though, by the recovery of the cestuy que trust in tail, the equitable remainders expectant thereon are barred, yet they do not allow any legal remainder to be affected by it; *Robinson* v. *Cumming*, Forrest. 164. 1 Atk. 473. *Salwin* v. *Thornton*, Amb. 545, 699. Cruise on Recoveries, 241; nor will courts of equity support a recovery by the cestuy que trust in tail, if there be an estate for life in another, prior to such estate tail; because, in such case, if the legal estate had been conveyed and executed according to the trust, such recovery would not have been good at law, unless the tenant for life had joined in it—Per Lord Nottingham, *North* v. *Champernon*, 2 Ch. Ca. 63, 78; in which case his Lordship laid it down as a general rule, that "any legal conveyance or assurance, by a cestuy que trust should have the same effect and operation upon the trust as it would have had upon the legal estate in law, in case the trustees had executed their trust; as otherwise, trustees, by refusing, or not being capable to execute their trust, might hinder the tenant in tail of the liberty to dispose of his estate, and bar the remainders, which the law gives him, as incident to his estate; which would be manifestly inconvenient, and tend to the introducing of perpetuities." See *Burnaby* v. *Griffith*, 3 Ves. 236. *Bowater* v. *Ellis*, Pre Ch. 81.

cution (*c*). And so where there was no express covenant concerning the value of the

(*c*) This proposition is too generally stated; for though equity will enforce the specific performance of fair and reasonable contracts, where the party wants the thing in specie, and cannot have it in any other way; see *Pusey* v. *Pusey*, 1 Vern. 273. *Fells* v. *Read*, 3 Ves. 7. *Arundel* v. *Phipps*, 10 Ves. 139. *Nuthorn* v. *Thornton*, 10 Ves. 159. *Lloyd* v. *Loaring*, 6 Ves. 773. Yet, if the breach of the contract can be, or was intended to be, compensated in damages, courts of equity will not interpose. See *Errington* v. *Annesley*, 2 Bro. Rep. 341. *Cudd* v. *Rutter*, 1 P. Wms. 570. *Capper* v. *Harris*, Bunb. 135, *Flint* v. *Brandon*, 8 Ves. 159. See c. 1. s. 5. n. and c. 3. s. 5. It is observable, that the legal validity of the contract makes a term in the proposition stated by our author: but, upon the necessity of the contract being good at law, in order to entitle the party to a specific performance in equity, a contrariety of opinion appears to have prevailed. In *Cannel* v. *Buckle*, 2 P. Wms. 243, Lord Macclesfield distinctly asserts, "that it is not a true rule, that where an action cannot be brought at law, on an agreement for damages, that a suit in equity will not lie for a specific performance:" and the case of *Cannel* v. *Buckle* seems to bear out the observation; for clearly, the wife could not maintain an action at law against her husband; and yet equity did enforce performance of an agreement which the husband had entered into in her favour. See also *Acton* v. *Pierce*, 2 Vern. 480. *Cage* v. *Acton*, 1 Lord Raym. 515. But in *Dr. Bettesworth* v. *Dean and Chapter of St Paul's*, Sel. Ca. Ch. 67, 69, Lord Chief Justice Raymond as distinctly affirms, that "a specific performance shall never be compelled, for the not doing of

lands to be settled, but only the marriage articles recited them to be 500 *l.* per annum, yet equity decreed the deficiency to be made up out of other lands (9).

(1) *Gleg* v. *Gleg*, 5 Vin. Ab. p. 511. pl. 21. *Benson* v. *Bellasis*, 1 Vern. 16.

which the law would not give damages." And Lord Hardwicke, in *Dodsley* v. *Kinnersley*, Amb. 406, in support of this rule, states, that, "it was the practice, before Lord Somers's time, as to agreements, to send the party to law; and if he recovered damages, then to entertain the suit." See the *Marquis of Normandy* v. *Duke of Devonshire*, 2 Freem. 217. Upon this difference of opinion, it would ill become me to do more than to observe, that as the case before Lord Macclesfield did, from its circumstances, demand the interposition of a court of equity; and as the same relief had been before given, in *Cage* v. *Acton*, by Lord Keeper Wright, the rule stated by Lord Chief Justice Raymond, however well founded as a general rule, must give way, where injustice would result from a strict adherence to it. See Francis's Max. 6. See *Chandos* v. *Brownlow*, 2 Ridg. P. C. 416.

SECTION II.

And although they formerly thought that where there was a bond given to perform an agreement, the obligor had his election

either to do the thing or pay the money, and that the obligee, having chosen his security, ought to be left to it, yet now they consider the penalty only as a collateral guard to the agreement, which still remains the same and unimpeached by the parties, providing a further remedy at law for the performance, and, therefore, proper to be executed in this court(*d*). So if the obligor

(*d*) "Where a penalty is intended merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional; and therefore only to secure the damage really incurred." Per L. Thurlow, C. *Sloman* v. *Walter*, 1 Bro. Rep. 418. *Barrett* v. *Blagrave*, 5 Ves. 555. *Hardy Martin*, 1 Cox's R. 26. But see *Saville* v. *Saville*, 1 P. Wms. 745. And upon this construction of a penalty, courts of equity will interpose, to restrain proceedings at law to recover the penalty. But as courts of equity will interpose to restrain the recovery of the penalty, the principles of equal justice require that they should enforce the specific performance of the act agreed to be done, or restrain from the doing of that which it was agreed should not be done. And upon this principle, wherever the primary object of the agreement be the securing of the specific subject of the covenant, the party covenanting is not entitled to elect whether he will perform his covenant or pay the penalty. See *Hobson* v. *Trevor*, 2 P. Wms. 191. *Parks* v. *Wilson*, 10 Mod. 517. *Chilliner* v. *Chilliner*, 2 Ves. 528. But if the covenant be to do or not to do some particular act, or doing it, or neg-

dies before the day, yet the lands must be settled according to the agreement; and so it has been often done (1). For it would be hard that the enlarging his security at law should make him in a worse condition in equity than if he had taken none at all; nor can it ever be intended, that a bond,

(1) *Holtham* v. *Ryland*, 1 Eq. Ca. Ab. 18. pl. 8. Nelson's Rep. 205.

lecting to do it, to pay a certain sum, by way of liquidated damages, courts of equity will not relieve against the payment of such damages; *East India Company* v. *Blake*, Finch's Rep. 117. *Ponsonby* v. *Adams*, 6 Bro. P. C. 417. *Rolfe* v. *Paterson*, 6 Bro. P. C. 470. *Lowe* v. *Peers*, 4 Burr. 2228. See also *Small* v. *Lord Fitzwilliam*, Pre. Ch. 102. *Ray* v. *D. of Beaufort*, 2 Atk. 190; but see *Benson* v. *Gibson*, 3 Atk. 395. And as courts of equity will not relieve against stipulated damages, they will not, in general, interpose to enforce the performance of the covenant, or to restrain its violation. See *Hill* v. *Barclay*, 16 Ves. 402. *Bracebridge* v. *Buckley*, 22 April 1816. *White* v. *Warner*, 2 Meriv. 439. Therefore, where the lessee covenanted not to plough certain land, or if he did, to pay 20*s*. per acre per ann. the court refused to restrain the lessee from ploughing: *Woodward* v. *Gyles*, 2 Vern. 119. But there are some circumstances which will induce the court to interfere, though stipulated damages be reserved; as where the lessee had covenanted not to plough *ancient* meadow, or if he did, to pay an increase of rent, the court, upon his threatening to plough, appears to have granted an injunction; *Webb* v. *Clarke*, 8th May 1782. See also *Dulwich College* v. *Davis*, M. 1787. *Sir John Warden* v. *Eklers*, 17 Dec. 1739.

added only to enforce the performance, should weaken the lien of the agreement (*e*).

(*e*) It may be laid down as a general rule, that the agreement of parties, if express, ought not to be affected by the taking of a collateral security, intended merely to secure the performance of such agreement: but if the agreement be merely implied, as that the vendor shall have a lien on the estate till the purchase-money be paid, (*Chapman* v. *Tanner*, 1 Vern. 267. *Walker* v. *Preswick*, 2 Ves. 622. *Pollexfen* v. *Moore*, 3 Atk. 272,) the taking of a bond, or other security, for the purchase-money, might reasonably lead to the conclusion that the vendor trusted to such security, and that the property of the estate was intended to be absolutely vested in the vendee; *Bond* v. *Kent*, 2 Vern. 281. *Fowell* v. *Heelis*, Ambler, 724. *Nairn* v. *Prowse*, 6 Ves. 752; but see *Blackburn* v. *Gregson*, 1 Bro. Rep. 420. *Macreath* v. *Symmons*, 15 Ves. 329. *Cowell* v. *Simpson*, 16 Ves. 278. *Great* v. *Mills*, 2 Ves. & Bea. 306. *Cowell* v. *Simpson*, 16 Ves. 278. *Ex parte Peake*, 1 Mad. Rep. 256; in which the doctrine is fully considered.

SECTION III.

But, regularly, the law never gives any other remedy than what the party has provided for himself, for this would be to alter

the agreement of the parties (1); though, in some cases, it is otherwise. And the diversities seem to be thus settled: 1st, where there is no remedy at law, equity will certainly grant one (*f*); as in case of a rent-seck, to decree seisin; or where the deeds, by which it is created, are lost, and so uncertain what kind of rent it was; for wherever there is a right, there ought, in equity, to be a remedy for it (*g*). But

(1) *Earl of Warrington* v. *Sir J. Langham*, Pre. Ch. 89. *Bosville* v. *Brander*, 1 P. Wms. 461. *Jordan* v. *Sawkins*, 12 Dec. 1793. *Champernon* v. *Gibbs*, Pre. Ch. 126. 2 Vern. 382. But see *Legard* v. *Hodges*, 1 Ves. jun. 477. *Cooke* v. *Wiggins*, 10 Ves. 192.

(*f*) Courts of equity not suffering a right to be without a remedy, interpose in all cases in which the right is clear, but, from the want of particular evidence, &c. unavailable at law. See Francis's Maxims, Max. 6, where the cases illustrative of this rule of equity are brought together, and very forcibly applied.

(*g*) The cases of rent, antecedent to the statute of Anne, must now be laid aside; for whether it be rent-seck, or rent-service, the lessor may now distrain, or bring his action of debt: but still there are cases, in which it is necessary for courts of equity to interpose; as where the premises are stated to be uncertain; *Eaton College* v. *Beauchamp*, 1 Ch. Ca. 121. *Duke of Bridgwater* v. *Edwards*, 4 Bro. P. C. 139; or where the days on which the rent is payable are stated to be uncertain: *Holder* v. *Chambury*, 3 P. Wms. 256; or its nature be uncertain; *Collett* v. *Jacques*, 1 Ch. Ca. 120. *Benson* v. *Baldwin*, 1 Atk. 598. *Cox* v. *Foley*, 1 Vern. 359. *Bouverie* v. *Prentice*, 1 Bro. Ch. Rep. 200; or where there are no demesne lands on which to distrain; *Duke of Leeds* v. *Powell*, 1 Ves. 170, 171;

if a man comes to be remediless at common law, by his own negligence, he shall not be relieved in equity. As if a man loses

or where the distress is obstructed by fraud; *Davy* v. *Davy*, 1 Ch. Ca. 147; or where no distress can be made, the subject being of an incorporeal nature, as where a rent is issuing out of tithes; *Thorndike* v. *Allington*, 1 Ch. Ca. 79. *Berkeley* v. *Earl of Salisbury*, cited by Lord Thurlow, in *Duke of Leeds* v. *Corporation of New Radnor*, 2 Bro. Rep. 338, 518. The case of the *Duke of Leeds* v. *Corporation of New Radnor*, may, in its first impression, be thought to have been relievable at law; for though, for the purpose of making it the subject of equitable jurisdiction, the bill alleged that the lands in question had undergone various alterations in their boundaries, yet the defendants, by their answer, denied that any alteration whatever had taken place in such particular, and insisted that the plaintiff's remedy was at law; and Lord Kenyon, then Master of the Rolls, appears to have been of such opinion, but he retained the bill for a year. Lord Thurlow, C. however, conceived the legal remedy to be doubtful, and was of opinion, that the defendants having admitted the plaintiff's right, and the bill having been retained, had done away the objection pressed against the jurisdiction of the court. It may be material to observe, that his lordship's opinion went upon the grounds of an admission of the right, and the previous retaining of the Bill. As to the admission of the right, if it stood alone, that probably would not be thought a sufficient circumstance to give to a court of equity cognizance of a matter not properly within its jurisdiction; and with respect to the bill having been retained for a year, the same circumstance occurred in *Ryan* v. *Macmath*, 3 Bro. Rep. 15;

(2) *Vincent* v. *Beverley*, Noy, 82.

his deed (2), unless he can make it appear that it was once actually in his custody, and that he has been deprived of it by some casualty or misfortune (*h*). So if a man destroys his remedy to distrain, and cannot have debt for the arrears, it being due out of a freehold, he shall not be relieved for them in equity (3). So in cases proper for law, a man must defend himself by legal pleadings. And a court of equity is not to relieve either mispleading, or where there is a neglect and want of a plea, or no proper plea put in in time (*i*); for it was

(3) 1 Roll's Ab. 375. pl. 3.

notwithstanding which the suit was dismissed for want of equity. See also *Curtis* v. *Curtis*, 2 Bro. Rep. 620, where this point was very much considered.

(*h*) The bare allegation that a deed or other instrument is lost, is certainly not sufficient to found a right to relief in equity; for, as already shewn, c. 1. s. 3, where relief is sought upon a deed, or other instrument, alleged to be lost, an affidavit must be filed with the bill, stating that the plaintiff has not such deed in his possession, &c.; and it is further necessary that the plaintiff should prove that such deed, &c. had once existence: but I am not aware that it is necessary for the plaintiff to shew that it was ever in his custody, if it appears to have existed, and to have been in the custody of the person under whom he derived his title.

(*i*) Equity will relieve against the mispleading of infants. See c. 2. s. 4; and that evidence may be gone

his own fault (4). So equity will not relieve for mesne profits, unless in a case of a trust, or an infant (*k*), where no entry was

(4) *Anon.* 1 Vern. 119. *Blackhall* v. *Coombes*, 2 P. Wms. 70. *Stephenson* v. *Wilson*, 2 Vern. 325. *Ex parte Goodwyn*, 2 Vern. 696. But see *Robinson* v. *Bell*, 2 Vern. 146. *Lady Gainsborough* v. *Gifford*, 2 P. Wms. 424.

into upon a rehearing, which was not upon the record when the cause was originally heard; see 1 Eq. Ca. Ab. 43. 1 Vern. 140. Pra. Reg. 317. Praxis alma, 14.

(*k*) In the case of the *Duke of Bolton* v. *Deane*, Pre. Ch. 516, Lord Macclesfield held, that if any fraud had been used to conceal the title from the lessor, the court would decree an account of mesne profits. See also *Bennett* v. *Whitehead*, 2 P. W. 644. And in *Curtis* v. *Curtis*, 2 Bro. Rep. 620, the Master of the Rolls extended the benefit of such account to a dowress; who is now considered as entitled, in all cases, to come into equity for her dower, if she prefer such mode to proceeding at law; and though she die before her right to dower be established, equity will decree an account of the rents and profits of the estate of which she was dowable, in favour of her representatives; *Wakefield* v. *Child*, 8th July 1791, MSS. Courts of equity, when resorted to for the purpose of an account of mesne profits, will, in many cases, consult the principle of convenience; and therefore, in *Townsend* v. *Ash*, 3 Atk. 336, Lord Hardwicke, held, that, "though the party claiming a share in the New River Water-works had not established his right at law, yet, as such right appeared to the court, he ought to have an account of the mesne profits; for though shares in water-works are a legal estate and corporeal inheritance, yet no one proprietor could receive the profits himself, but the company or

made by the person entitled to the mesne profits (5). 2dly, Where there is a remedy

(5) *Owen* v. *Aprice*, 1 Ch. Rep. 17.
Hutton v. *Simpson*, 2 Vern. 724. *Tilly* v. *Bridges*, Pre. Ch. 252. *Duke of Bolton* v. *Deane*, Pre. Ch. 516. *Norton* v. *Frecker*, 1 Atk. 524.

their officers, are the common hand to receive the profits; and that it would be absurd to send the plaintiffs to law, for it would be difficult to bring ejectment for a thirty-sixth part and bits of land in several counties; and to bring actions of trespass against the terre-tenants would be very extraordinary; and therefore, in point of remedy, there could not be a stronger case for an account of mesne profits." Courts of equity, in decreeing an account of mesne profits where the plaintiff has been prevented from asserting his title by infancy, a trust, or fraud, will direct such account to be taken from the time the plaintiff's title accrued, until special circumstances require that such account should commence from the time of entry, or of filing the bill. *Dormer* v. *Fortescue*, 3 Atk. 130. *Bennett* v. *Whitehead*, 2 P. Wms. 643. But it may be proper to observe, that, even in the most favoured cases, in taking the account of rents and profits, interest is seldom allowed, especially if the sum be small and uncertain; *Ferrers* v. *Ferrers*, Forrest. 2, 3. *Micklethwaite* v. *Boatman*, 1 Ch. Rep. 97. *Batton* v. *Earnley*, 2 P. Wms. 163. 2 Atk. 211, 411. See also *Tew* v. Lord *Winterton*, 1 Ves. jun. 451, and the cases there referred to. The cases, decreeing an account of rents and profits where the legal title is not previously established, proceed upon that respect, which in justice is due to the interest of persons, who, by infancy or fraud, &c. have been prevented from pursuing their legal right; but it must not be inferred, from the extreme anxiety of courts of equity to protect such rights, that they will, at any

at law, equity will not grant a further one, although the remedy at law is not sufficient;

period, or under any circumstances, act upon such indulgent disposition; for if an infant neglect to enter within six years after he comes of age, he is as much bound by the statute of limitations, from bringing a bill for an account of mesne profits, as he is from an action of account at common law; *Lockey* v. *Lockey*, Pre. Ch. 518; or if there be a verdict at law against the infant's title, courts of equity will not direct an account of mesne profits, but will merely retain the bill, for the purpose of giving the infant an opportunity to establish his title at law, E. of *Newburg* v. *Bickerstaff*, 1 Vern. 2945. But if the plaintiff has been kept out of possession by fraud, *qu.* whether equity will not relieve at any distance of time, as no length of time will bar a fraud of which the party affected by it was not apprized? *Cottrell* v. *Purchase*, Forrest. 63.

It may here be proper to consider whether a court of equity will decree an account of mesne profits against an executor in respect of the testator's having, by an injunction, restrained the plaintiff from recovering at law in the life-time of the testator. If the court were not to decree an account in such a case, its interference would work a wrong, because the plaintiff might have recovered at law in the life-time of the testator, if he had not been so restrained. But if the court should interfere, and the defendant shew an equity at least equal to that of the plaintiff, its interference would deprive the defendant with an equal equity of the legal right. See *Pultney* v. *Warren*, 6 Ves. 73.

(*l*); unless there be some fraud, or the like (6). And therefore, in all cases, where the court has decreed payment of the rent, and thereby charged the person, no other remedy could be obtained. And the usual relief, even where, for want of seisin, there was at law no remedy, is only to decree seisin (7). But this is to be understood of a remedy provided by the party himself; as in a grant, or reservation of a rent by deed; otherwise of a devise of a rent, in which the devisor is intended to have been inops consilii: for this is a particular mischief, not against any maxim or rule, though unprovided for by the law (8).

(6) *Davey* v. *Davey*, 1 Ch. Ca. 144. *Duke of Bolton* v. *Deane*, Pre. Ch. 516. See also *Horn* v. *Horn*, Ambl. 79. *Cailland* v. *Estwick*, Anstr. 384. *Angel* v. *Draper*, 1 Vern. 399. *Shirley* v. *Watts*, 3 Atk 192.200. *Belsh* v. *Westall*, 1 P. Wms. 444.

(7) *Palmer* v. *Whettenhal*, 1 Ch. Ca. 184.

(8) *Shute* v. *Malory*, Moore, 805. 1 Eq. Ca. 364 pl. 1.

(*l*) There are instances, indeed, in which a court of equity gives remedy where the law gives none; but "where a particular remedy is given by law, and that remedy bounded and circumscribed by particular rules, it would be very improper for a court of equity to take it up where the law leaves it, and extend it further than the law allows." P. Lord Talbot, C. *Heard* v. *Stamford*, Forrest. 174; but see *Dormer* v. *Fortescue*, 3 Atk. 124. *Curtis* v. *Curtis*, 2 Bro. Rep. 633; in which cases it was held, that equity will give relief beyond that which the party could obtain at law, if the recovery of the demand has been unconscientiously obstructed. See ante, note (*b*.)

SECTION IV.

THERE is also an implied as well as an express assent; as where a man who has a title, and knows of it (*m*), stands by, and either encourages, or does not forbid the purchase, he shall be bound, and all claim-

(*m*) In the case of *Dyer* v. *Dyer*, 2 Ch. Ca. 108, Lord Chancellor Finch held, that the defendant's ignorance of his title materially differed the case; but in *Teasdale* v. *Teasdale*, Sel. Ca. Ch. 59, Lord Chancellor King postponed the title of the father to that of his son's widow, upon the ground of the father having allowed and witnessed the settlement made by the son on his marriage, under the notion that the son was tenant in fee; whereas he proved to be only tenant for life, and the father remainder-man in fee. It is observable, however, that, in this case, the Chancellor adverted to the near relation of father and son, and threw out, that had the real titles of the parties been fully understood, the father would have been required to join in the settlement, or the marriage would not have taken place. His Lordship, however, by the reporter, is made to conclude with observing, that "as the father, knew of the settlement, he should not take advantage against it." See *Pearson* v. *Morgan*, 2 Bro. Ch. Rep. 388. *Pilling* v. *Armitage*, 12 Ves. 78. See *Dowling* v. *Mill*, 1 Maddock's Rep. 541.

ing under him by it (1). Neither shall infancy or coverture be any excuse in such case (2). And this seems a just punishment for his concealing his right; by which an innocent man is drawn in to lay out his money (*n*) (3). And for the same reason,

(1) *Hobbs* v. *Norton*, 1 Vern. 136. *Hundsden* v. *Cheyney*, 2 Vern. 150. *Draper* v. *Borlace*, 2 Vern. 370. P. Lord Hardwicke, *Arnott* v. *Bigle*, 1 Ves. 95. *Raw* v. *Pole*, 2 Vern. 239. *Berrisford* v. *Milward*, 2 Atk. 49. *E. I. Company* v. *Vincent*, 2 Atk. 3. *Jackson* v. *Cator*, 5 Ves. 688. (2) *Watts* v. *Creswell*, *Clare* v. *E. of Bedford*, cited in *Savage* v. *Foster*, 9 Mod. 33. *Evroy* v. *Nichols*, 2 Eq. Ca. Ab. 489. *Becket* v. *Cordley*, 1 Bro. R. 353. (3) See *Stiles* v. *Cooper*, 3 Atk. 692. *Anon.* Bunb. 53. *Henning* v. *Ferrers*, Gilb. Rep. 85.

(*n*) If a man by the suppression of the truth, which he was bound to communicate, *Fox* v. *Macreth*, 2 Bro. Ch. Rep. 420, or by the wilful suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation; and upon that principle, the cases referred to in the margin (1) evidently proceeded; but where the party to whom the fraud is imputed, was not conusant of the treaty in which the fraud was practised, nor in any manner, nor for any fraudulent purpose, confederating with the party practising the fraud, the above principle does not apply. Therefore, where A. lent money to B. on mortgage, but before he did so, sent C. to inquire of D. who had a prior mortgage, whether he had any incumbrance on B.'s estate, who denied he had any; D. by his answer having denied that C. told him that A. was about to lend B. any money: the Lord Keeper, upon appeal, directed an issue at law, to try whether C. did or did not communicate such fact to D.

such fraud in a mortgagee will, without doubt, postpone his mortgage (4). So if A. make an absolute conveyance to B, for 500 *l.* and B. executes a defeasance, upon

(4) *Draper* v. *Borlase*, 2 Vern. 370. *Berrisford* v. *Milward*, 2 Atk. 49.

Ibbottson v. *Rhodes*, 2 Vern. 554. See also *Merewether* v. *Shaw*, 2 Cox's R. 124. This issue would have been superfluous if the bare naked falsehood had been a sufficient ground for postponing the demand of D. See *Pasley* v. *Freeman*, 3 Term. Rep. 51, in which case the effect of this distinction at law is fully and ably investigated. It may be proper, in this place, to consider what shall be construed a concealment. In the case of *Mocatta* v. *Murgatroyd*, 1 P. Wms. 393, Lord Chancellor Cowper held, that where a first mortgagee is a witness to the second mortgage, though no actual proof of his knowing the contents thereof, yet, since the presumption is, that he might have known them, it shall postpone him: but none of the cases seem to come up to this point; and in *Becket* v. *Cordley*, 1 Bro. Ch. R. 353, Lord Chancellor Thurlow, referring to this case, observes, that "he did not leave it as a case, which he should determine in the same manner, for a witness in practice is not privy to the contents of the deed." Vide Dig. lib.] 13. t. 7. 39. Domat's Civil Law, b. 3. t. 1. s. 15. p. 365, where the point is fully considered. It has also been laid down as "an established rule in equity, that a second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money, without taking the title-deeds, he enables the mortgagor to commit a fraud." *P. Buller*, J. *Goodtitle* v. *Morgan*, 1 Term Rep. 762. The fraud imputed to the first mortgagee by this supposed rule of equity is, the enabling of the mortgagor to practise a fraud upon a third person, by leaving him in

payment of 1,500*l.* within sixteen years, and B. on his marriage, settles this as an absolute estate on his wife, and the issue of that marriage, there being proof that A. made

possession of what furnishes the best evidence of his title: and there are cases to which this rule might wisely and equitably be applied; but to lay it down as applicable to every case, in which the mortgagor appears in possession of the deeds at the time of the second mortgage, were not only to break in upon the authority of many decisions, but also, under some circumstances, to endanger the equity which it professes to promote. It would postpone the first mortgagee of an estate held in joint-tenancy, or in common, the joint-tenants being equally entitled to possession of the deeds. The whole of the premises contained in the deeds must be in mortgage, though the intent of the parties might extend to only a particular part of them; or the mortgagee of the part must retain the possession of the deeds which respect the whole. These considerations have induced courts of equity to look to the circumstances under which the mortgagor obtained, or was allowed to retain, the title-deeds; and therefore, in the case of *Peter* v. *Russel*, 1 Eq. Ca. Ab. 321. pl. 7. 2 Vern. 726. Gilb. Rep. 122. it appearing that the mortgagor obtained possession of the title-deeds from the first mortgagee upon a reasonable pretence, Lord Cowper dismissed the bill brought by the second mortgagee to postpone the first. So in *Penner* v *Jemmett*, MSS. 28th June 1785, it appearing that the first mortgagee had required and was assured by the mortgagor that he had delivered to him all the title-deeds, Lord Chancellor Thurlow held, that there must be a voluntary leaving of the deeds, to entitle the second mortgagee to

the conveyance to enable B. to get a fortune though another lady, and not the wife he really married, yet he shall be bound as particeps criminis, notwithstanding that the wife's father had notice of the defeas-

gain the priority. So in *Towle* v. *Rand*, 2 Bro. Ch. R. 650. which was the mortgage of a reversion, Lord Thurlow, C. decreed for the first mortgagee. And in *Plumb* v. *Fluit*, MSS. 3d Feb. 1791, the court of Exchequer, in a very solemn and most able judgment, held, upon the general question, that the merely leaving of the title-deeds in the possession of the mortgagor was not of itself a sufficient ground to postpone the first mortgagee. See *Evans* v. *Bicknell*, 6 Ves. 174. *Barnett* v. *Weston*, 12 Ves. 133. The rule laid down by Lord Thurlow, C. may, therefore, be now considered as the rule of equity; viz. that nothing but a voluntary, distinct, and unjustifiable concurrence on the part of the first mortgagee to the mortgagor's retaining the title-deeds, shall be a reason for postponing his priority. It would ill become me, upon a rule so reasonable in its application to particular cases, and so fortified by a concurrence of authority, to observe more than that it must, if allowed to operate as an universal rule, preclude the possibility of a mortgagee being at any time certain of his security; a consequence which so seriously affects the real property of the country, as to call for the intervention of the legislature to furnish some mean by which its general inconvenience may be obviated. But though courts of equity will not, on such ground, postpone the first mortgagee, yet, it seems, that they will not take from the second mortgagee the title-deeds, unless the first mortgagee pay him his money. *Head* v. *Egerton*, 3 P. Wms. 279.

ance before the settlement made (*o*). So if A. agrees for the purchase of timber, and he and B. enter into a bond that A. his executors and administrators, shall not cut down timber under such a size, it comes out that A.'s name was only made use of for B., B. cuts down timber under the size, there can be no remedy against B. upon this bond; but it is a fraud upon the seller, and relievable in equity. But this relief is extended only to jointures, mortgages, and such as come in upon a consideration, and not to a voluntary devisee (5).

(4) *Row and Uxor* v. *Pole*, 2 Vern. 239. Pre. Ch. 35.

(*o*) To the principle of this case may be referred the several cases in which courts of equity have held the party colluding in a misrepresentation barred from disturbing the claims of such persons as the law considers purchasers for valuable consideration. See c. 4. s. 11.

SECTION V.

HOWEVER, where the intent is only to give damages, equity will not decree a specific performance (*p*); as where a settlement is

(*p*) The cases of *Bagg* v. *Foster*, and *Collins* v. *Plumer*, referred to in the margin, are direct authorities in

made to the husband for life, remainder to his intended wife for life, remainder to the heirs of the body of the husband on the body of the wife, remainder to his own right heirs, with a covenant, that he would not dock the entail, nor suffer a recovery. Although this covenant seems to be executory, and like a covenant that a man would not execute a power to make leases, yet there is a difference, where the agreement is subsequent to the raising the power to extinguish it, and the case here, where all is in the same deed. For the party here knew that he had a power to bar the entail, and therefore agrees to accept of a covenant, by which he is to have damages only, and not the thing in specie; for that would be to carry it beyond the agreement (1).

(1) *Bagg* v. *Foster*, 1 Ch. Ca. 188, 189. *Collins* v. *Plumer*, 1 P. Wms. 104. 2 Vern. 635.

support of this rule of equity: it must not, however, be extended to cases of articles, or executory agreements for the performance of which a penalty is reserved. The grounds of this distinction I have had occasion to consider, c. 3, s. 2.

SECTION

SECTION VI.

THE agreement ought also to be complete and perfect; for pacta contractuum præparatoria are not binding (1) either in law (*q*) or equity (2). As if, upon a treaty of marriage, the father and husband go to counsel, who, hearing the proposals on both sides, takes down minutes or heads of them in writing, and gives them to his clerk to draw a settlement: these preparatory heads might have received several alterations or additions, or the agreement have been entirely broken off, upon further inquiry into the parties' circumstances;

(1) Puff. B. 3. c. 5, s. 8, 9.
(2) *Whaley* v. *Bugnall*, 6 Bro. P. C. *Whitchurch* v. *Bevis*, 2 Bro. Rep. 559.

(*q*) The rule of law is, actus inceptus cujus perfectio pendet ex voluntate partium revocari potest, Lord Bacon's Maxims of the law, Reg. 20; and the rule of equity seems to be conformable to the rule of law; for "if there be general instructions for an agreement, consisting of material circumstances, to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be signed by the parties, and no fraud, but the party takes advantage of the locus penitentiæ, he shall not be compelled to perform such an agreement as that, when he insists upon the statute of frauds." P. Lord Thurlow, C. *Whitchurch* v. *Bevis*.

and therefore, if they marry without the consent of the father, it is at their peril; for there is no case where an agreement, though wrote by the party himself, should bind, if not signed, or in any part executed by him (2). But if the marriage had been had upon the foot of this writing, and the father had been privy and consenting to it, he should then have been obliged to execute his part (3). So in a will, if the writing be but a draught, or preparation to a testament, and not a testament itself, it is without any force, for the testator must have animum testandi (*s*). But notes taken from the mouth of the deceased of his last

(2) *Bawdes* v. *Lord Amherst*, Pre. Ch. 402.

(3) *Cookes* v. *Mascall*, 2 Vern. 200. (*r*) *Halfpenny* v. *Ballett*, 2 Vern. 373. *Parker* v. *Serjeant*, Finch's Rep. 146. *Maclean* v. *Nash*, Ex. Hill, T. 1788.

(*r*) Though the court will, in general, infer the consent of the party, from his being present at the marriage; yet, if he has expressed his disapprobation, and endeavoured to prevent its taking place, the court will leave the husband to recover the proposed portion at law. *Douglas* v. *Vincent*, 2 Vern. 202.

(*s*) It is certainly true, that the animus testandi must be collected from the instrument, or the law will not consider it as a will; but it may be material to observe, that though the writing be not signed or witnessed, it is not from the want thereof to be considered, as to personal estate, a mere draught; for though it has neither his name nor seal to it, nor witnesses present at its publication, yet the writing may operate as a testament of chattels, if sufficient proof can be had that it

will, or made by his appointment, and read to him, though not writ in form of law, were a sufficient will in writing, upon the statute of 32 and 34 H. VIII. (*t*) (4). And in wills where the devises are several and distinct, the perfect is not to be hurt by the imperfect, although the testator die before the whole is finished, for perseverance, and not mutation of will, is to be presumed (*u*) (5).

(4) *Nash* v. *Edmunds*, Cro. Eliz. 150.

(5) *Butler* and *Baker*'s case, 3 Co. 31. b.

is the testator's hand-writing. Godolphin, p. 1, c. 21, s. 2. And so it would have done as to lands, before the statute of frauds. *Bate*'s case, Sid. 362. *Anon.* 2 Leon. 35. See Moore, 177. Dyer, 66. 2 Leon. p. 4. 159. 166. 1 Mod. 117. 1 Ca. Ch. 248. Finch, 195. 2 Comyns's Rep. 451. Swinb. part 7. s. 16. 5. *Carey* v. *Askew*, 2 Bro. Ch. Rep. 1 P. Wms, 10. 529. 1 Cox's R. 241.

(*t*) It seems from the opinion of the court in *Nash* v. *Edmunds*, that the will should not take effect, unless written by the command of the devisor, or by his consent, and by the person appointed by the devisor for such purpose. Q. If the consent of the devisor shall be inferred from the will being afterwards read over to him? See Powell's Law of Devises, p. 27.

(*u*) It was necessary, however, that the particular devise should be perfect, and put in writing, during the life of the devisor, *Cæsar and Like*'s case, Dyer, 72. note 2.

SECTION VII.

AND wherever there is a demand in law or equity, there must be a certainty of the thing demanded (*x*), to be adjudged or decreed, or at least a mean to reduce it to a

(*x*) This rule is applicable to most cases; but there may be circumstances under which the strict application of it would lead to injustice; and in such cases, courts of equity will endeavour to enforce the specific performance of the agreement, notwithstanding the loose manner in which the terms of it may be expressed. Thus in *Allen* v. *Harding*, 2 E. Ca. Ab. 17, pl. 6, the defendant being curate of Newcastle, had covenanted to build a house on the glebe land; which he afterwards refusing to do, the plaintiff brought his bill for a specific performance. The defendant insisted on the uncertainty of the agreement, if specifying neither the time when the house was to be built, nor what sort of a house it should be, and therefore sounding only in damages. But per Lord Chancellor, Who can the damages go to? surely to B. to whom the covenant was made. His Lordship then observed, that the covenant was designed for the benefit of the church; and therefore, if it could possibly be specifically performed it ought, and decreed a convenient house to be built: and for that purpose, each side to choose two commissioners, neighbouring gentlemen; and if they could not agree, then to resort to the ordinary of the diocese to settle the matter between them. See also *Moseley* v. *Virgin*, 3 Ves. jun. 184.

(1) Hob. 174. 1 Sid. 270. *Bromley* v. *Jefferies*, Pre. R. 138. 2 Vern. 415. *Anon.* 5 Vin. Ab. 521. pl. 32. 2 Eq. Ca. Ab. 45. pl. 10. *Buxton* v. *Lister*, 3 Atk. 386.

(2) *Rect of Chidington's* case, 1 Rep. 155.

certainty (1); for otherwise the court will not know how to give judgment. The agreement must also be fixed and settled, and not wavering and revocable, or else the representative will not be bound by it, if not perfected before the parties' death. But here are several diversities to be observed (2): 1st, Between a covenant, or other agreement, which is perfect and complete, although to take effect in possession upon a future matter precedent; and a covenant and agreement incomplete and imperfect, which is to be reduced to its perfection by future matter ex post facto; for, in the one case, the interest and estate in the land is presently vested, but in the other not; and therefore, it must be made perfect in the life-time of the parties, or else will not bind; for the lien never vesting in the ancestor or testator, cannot descend upon the heir, or devolve to the executor. As if land is rendered by fine to one and his heirs, there the land is bound, so that he cannot alter or defeat it: and though he to whom the render is made dies before the execution, yet his heir shall have it (*y*). But if a man devises land to

(*y*) A fine is now considered as completed upon the

one and his heirs, and after the devisee dies before the devisor, the devise is void; for the will was alterable at the pleasure of the devisor, and the heir cannot be a purchaser; because, by the words, he is appointed to take by way of limitation (2). 2dly, Between a covenant, or agreement executory, and a grant or bargain which must take effect, and change the property of the thing granted, either presently and at once, or depending upon somewhat that shall reduce it to its full effect; and therefore, if A. grant all his woods and underwoods growing upon all his manor which could conveniently be spared, without prejudice to the estate of his manor, this grant is void; because it is uncertain which trees may be spared, and which not, and there is no person appointed to determine it (z).

(2) *Brett* v. *Rigden*, Plow. 345. *Steed* v. *Berrier*, 1 Freem. 292. 293. *Hartopp*'s case, Cro. Eliz. 243. *Sympson* v. *Hornsby*, Pre. Ch. 429. 2 Vern. 722. *White* v. *White*, stated in a note to *Ambrose* v. *Hodgson*, Dougl. Rep. 344.

entry of the king's silver; and if any of the cognizors die before the remaining parts of the fine are perfected, still the fine shall operate; 5 Co. 39. a. *Farmer*'s case, Hob. 330. Cruise on Fines, 47, 48. See 2 Inst. 517.

(z) If one possessed of a term for 2000 years, leases the land to A. without mentioning any term, the grant is void for uncertainty; *Kearsley* v. *Duck*, 2 Vern. 684. But if tenant in fee lease for so many years as J. S. should name, it would be good; *Stukeley* v. *Butler*, Hob. 174. So if a man, having six horses in his stable,

But if it were a covenant or agreement executory, he might have taken trees by force of it, and have justified specially; averring, that they might be spared, and put himself upon the jury for it (3).

(3) *Stukeley* v. *Butler*, Hob. 174.

grants one of them, but does not specify which, A. in such case may choose, and when he has made his election, the grant is good; but if he die before he has made his election, the grant will never be good; Shepherd's Touchstone, p. 251. And the same reasons that prove, that where the election creates the interest, nothing passes till election, prove also, that where no election can be made, no interest can arise; Hob. 174.

SECTION VIII.

But besides the bare words of the agreement, the common law, to prevent imposition, ordained certain ceremonies, where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet, in equity, where there was a consideration, the want of ceremonies was not regarded (1). However, in former times, this court was very cautious of relieving bare parol agreements for lands, not signed by the parties, nor

(1) See c. 1. s. 7. p. 34. n.

any money paid (*a*); although they would sometimes give the party satisfaction for the loss he had sustained (*b*). And now, by the statute of 29 Car. II. cap. 3, if an agreement be by parol, or not signed by the parties (*c*), or somebody lawfully authorized by

(*a*) But if the agreement, though parol, was in part performed by one of the parties, it is said equity would decree a specific performance; *Marquis of Normandy*, v. *Duke of Devonshire*, 2 Freem. 216.

(*b*) In *Denton* v. *Stewart*, 1 Cox's Rep. 258, the Master of the Rolls referred it to a master, to inquire what damages the plaintiff had sustained by the defendant's having put it out of his power to perform his agreement; but I am aware of no other case in which such an order has been made: the usual decree being either a specific performance, or an issue quantum damnificatus. See *Greenaway* v. *Adams*, 12 Ves. 395.

(*c*) It was determined, very soon after the passing of the statute of frauds, that an agreement, signed by one of the parties, should be binding on the party signing it; *Hatton* v. *Gray*, 2 Ch. Ca. 164; *Robson* v. *Collins*, 7 Ves. 130. *Seton* v. *Slade*, 7 Ves. 265. *Fowle* v. *Freeman*, 9 Ves. 351. *Huddleston* v. *Briscoe*, 11 Ves. 583. So also a letter, *Ford* v. *Compton*, 2 Bro. C. R. 32. *Tawnay* v. *Crowther*, 3 Bro. C. R. 318; see p. 191, § 10, *note* (*k*); and in *Sir James Lowther* v. *Carill*, 1 Vern. 221; the court appears to have thought, that one of the parties making alterations in the draught, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter

(2) *Bawdes* v. *Amherst*, Pre. Ch. 402.

them, (2), if such agreement be not confessed in the answer, it cannot be carried into

decision seems to be done away by Lord Macclesfield's decree in *Hawkins* v. *Holmes*, 1 P. Wms. 770, by which his Lordship held, that unless in some particular cases, where there has been an execution of the contract, by entering upon and improving the premises, the party's signing the agreement is absolutely necessary for completing it, and that to put a different construction upon it would be to repeal the statute; and his Lordship therefore held, that the defendant's having altered the draught with his own hand, was not a signing to take it out of the statute; though the vendor afterwards executed the conveyance, and caused it to be registered. But this question received more particular consideration in the case of *Stokes* v. *Moore*, 1 Cox's Rep. 219; which was a suit for the specific performance of an agreement for the renewal of the lease of a house from Moore and his wife to Stokes. There having been some difficulty about the terms of the renewal, they at length came to an agreement; and defendant Moore being called upon to name some person to prepare the lease, he named a Mr. S. for that purpose, and wrote certain instructions, from which the lease was to be prepared, in these words, viz. "The lease renewed; Mr. Stokes to pay the king's tax; also to pay Moore 24 *l.* a year, half-yearly; Mr. Stokes to keep the house in good tenantable repair, &c." To this bill the defendants pleaded the statute of frauds; the plea was ordered to stand for an answer, with liberty to except; and the defendants having by their answer admitted the written instructions, one question made, on the hearing of the cause, was, whether there was a sufficient signature by Moore to take

execution. But where, in his answer, he allows the bargain to be complete, and does

this agreement out of the statute? and for the plaintiff it was insisted, that Moore having written his own name in the body of these instructions, would amount to such a signature; and that it did not signify whether the name was to be found at the bottom or the top, or in the body of the instrument; *Welford* v. *Beazley*, 3 Atk. 503. And it was likened to the cases upon wills, in which it had been determined, that the testator's writing his name in the introduction to the will, was a good signing within the statute: on the other side, *Hawkins* v. *Holmes* was relied upon. The Lord Chief Baron and Mr. Baron Eyre delivered their opinions, and the other Barons agreed, that the signature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and where the name is inserted in such a manner as to have that effect, it did not much signify in what part of the instrument it was to be found, as in the formal introduction to a will. But it could not be imagined, that a name inserted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required; upon which, as well as upon another ground, the bill was dismissed. See Mr. Cox's note (1) to *Hawkins* v. *Holmes*, 1 P. Wms. 770. That the signing by the auctioneer is sufficient, see *Simon* v. *Motivos*, 3 Burr. 1921. But see *Buckmaster* v. *Harrop*, 13 Ves. 456. 15 Ves. 521. That an auctioneer is regarded as clerk for the purchaser as well as for the vendor, see *Kemys* v. *Proctor*, 3 Ves. and Bea. 57, and the cases there referred to. As to agent authorized by parol, see *Mortlock* v. *Buller*, 10 Ves. 311. As to an agreement by letter, see p. 191, § 10, *note* (*k*).

not insist on any fraud (*d*), there can be no danger of perjury; because he himself has

(*d*) If a defendant confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such agreement. But it is of considerable importance to determine whether the defendant be bound to confess or deny a merely parol agreement not alleged to be in any part executed; or, if he do confess it, whether he may not insist on the statute, in bar of the performance of it.

The cases, upon the first point, are many in number, various in their circumstances, and the decisions upon them not immediately reconcileable. I shall, therefore, consider them in their principle rather than in detail. They who insist that the defendant is bound to confess or deny the agreement alleged, principally rely on the rule of equity, that the defendant is bound to confess or deny all facts which, if confessed, would give the plaintiff a claim or title to the relief prayed; and that as equity would decree a parol agreement, if confessed, the defendant must confess or deny it. It is certainly a general rule in equity, that the defendant shall discover whatever is material to the justice of the plaintiff's case; but in applying this rule to the case of a parol agreement, it is previouly material to ascertain whether the statute of frauds has not in such case relieved the defendant from this general obligation. The prevention of frauds and perjuries is the declared object of the statute; and the decreeing of a parol agreement, when confessed by the defendant, and the statute not insisted on, is evidently consistent with such object; nam quisque renuntiare potest juri pro se introducto. But if the defendant be bound to confess or deny the parol

taken away the necessity of proving it (3). So, if it be carried into execution by one

(3) *Creyston* v. *Bayne*, Pre. Ch. 208. *Symondson* v. *Tweed*, Pre. Ch. 374. See also *Attorney General* v. *Day*, 1 Ves. 221. *Potter* v. *Potter*, 1 Ves. 444. *Gunter* v. *Halsey*, Amb. 586.

agreement, his answer must be either liable to contradiction, or not liable to contradiction. If the defendant's answer be liable to contradiction by evidence aliunde the evil arising from contradictory evidence, which the statute proposed to guard against, would necessarily result. If the defendant's answer be not liable to contradiction by evidence aliunde, the rule would furnish a temptation to perjury, by giving the defendant a certain interest in denying the agreement; since, if he confessed it, he would be bound to perform it. If the defendant be bound to confess or deny the parol agreement insisted on by the plaintiff, one of the above consequences must necessarily ensue; which of the two is likely to prove the most mischievous, were, perhaps, difficult to decide; for though the perjury, which might take place, if contradictory evidence were allowed, is an evil of considerable size, yet the defendant's being liable to be contradicted, might operate as a check on his falsely denying that which was truly alleged. It seems, however, to have been the opinion of Lord Chancellor Thurlow, that the only effect of the statute is to preclude the plaintiff from resorting to evidence aliunde, for the purpose of substantiating a parol agreement denied by the defendant. *Whitchurch* v. *Bevis*, 2 Bro. Rep. 566. See also *Child* v. *Godolphin*, (Dick. Rep. 39.) therein cited by Lord C. Thurlow. *Cooth* v. *Jackson*, 6 Ves. 39. This rule, which, when the agreement is in no part performed, renders the defendant's answer conclusive, may certainly, in some instances, prevent fraud, but it is possible, that in other instances, it may encourage

of the parties (4), as by delivering possession, and such execution be accepted by

(4) *Butcher* v. *Staples*, 1 Vern. 363. *Pyke v. Williams*, 2 Vern. 455.

Foxcroft v. *Lister*, cited in *Pyke* v. *Williams*. *Lockey* v. *Lockey*, Pre. Ch. 510. *Floyd* v. *Buckland*, 2 Freem. 268. *Gunter* v. *Halsey*, Amb. 586. *Earl of Aylesford's* case, 2 Stra. 783. *Binsted* v. *Coleman*, Bunb. 65. *Borrelt* v. *Gomesara*, Bunb. 94. *Savage* v. *Forster*, 9 Mod. 37. *Owen* v. *Davis*, 1 Ves. 82. *Attorney General* v. *Day*, 1 Ves. 221. *Taylor* v. *Beech*, 1 Ves. 297. *Potter* v. *Potter*, 1 Ves. 441. *Lacon* v. *Mertins*, 3 Atk. 4. *Whitbread* v. *Brockhurst*, 1 Bro. Rep. 404. *Whitchurch* v. *Bevis*, 2 Bro. Rep. 566. *Denton* v. *Stewart*, MSS. 4th July 1716.

perjury. To strike out the mean by which the spirit of the statute might be preserved without trenching on its provisions, is certainly difficult, perhaps impossible; for it is clear that the statute intended to prevent fraud as well as perjury: and it cannot be denied, that the refusing to execute an agreement deliberately and fairly entered into, merely because it was not reduced into writing, is a fraud, which a court of conscience ought to discourage, but which it cannot discourage, if of such an agreement it cannot enforce a discovery. It would ill become me to pursue this point further; the difficulties which I have stated are probably sufficient to explain and justify the contrariety of opinion which has prevailed upon it. It remains, however, to consider, whether a defendant, having confessed the agreement alleged, can protect himself from the performance of it, by insisting on the statute? This, which is also vexata quæstio, is almost immediately dependant on the former point: for when Lord Macclesfield, in *Child* v. *Godolphin*, held, that the defendant was bound to confess or deny the agreement, it seems to have been a necessary consequence, that if the defendant confessed the agreement, he should not be allowed to avail himself of the statute; for if he might avail himself of the statute, cui bono compel him to confess or deny the agreement? See *Cottington* v. *Fletcher*, 2 Atk. 155.

the other, he that accepts it must perform his part; for where there is a performance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed (*e*). And it is unconscionable,

Lacon v. *Mertins*, 3 Atk. 1. But see *Kingsman* v. *Kingsman*, cited in 10 Mod. 404. But if the defendant be not bound to confess or deny the agreement, it must be in respect of the statute affording him a good defence against the performance of it; and if such be the effect of the statute, it should seem to be immaterial whether he set up such defence in the shape of a plea, or by his answer, the statute not having prescribed any mode in particular by which a defendant must avail himself of such defence. See *Stewart* v. *Careless*, cited in *Whitchurch* v. *Bevis*. It may be material here to observe, that even the cases which most favour the opinion that courts of equity may compel the performance, and consequently the discovery of merely parol agreements, require, that the terms of such agreement should be clear, definite, and conclusive; and therefore, if the courts can collect the jus deliberandi, or locus pœnitentiæ, to have been reserved, the contract shall not be considered as complete till reduced into writing, or in part performed. *Whaley* v. *Bagnel*, 6 Bro. P. C. 45. *Whitchurch* v. *Bevis*, 2 Bro. Rep. 566. *Clarke* v. *Grant*, 14 Ves. 519. *Mortlock* v. *Buller*, 10 Ves. 311.

(*e*) To allow a statute, having the prevention of frauds for its object, to be interposed in bar of the performance of a parol agreement, in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, in part per-

that the party that has received the advantage should be admitted to say, that such

formed, is not within the provisions of the statute. See *Whitchurch* v. *Bevis*. This exception, however, leads to considerable difficulties. Part performance is clearly a relative term; and in stating acts of part performance, the plaintiff must necessarily state the agreement to which he refers. The defendant, by the above rule, seems bound to consider the case stated as out of the statute; supposing him, however, to deny the acts alleged to have been done in part performance, would he be bound to admit or deny the parol agreement referred to? or admitting such acts to have been done, supposing him to deny the agreement, or the terms of the agreement, to which such acts are referred in part performance, would the plaintiff, in the latter case, be at liberty to resort to evidence aliunde, in order to substantiate such parol agreement?

In the first case, I conceive that the plaintiff would be entitled to go into evidence, to shew that the acts alleged were actually done; and if he succeeded in this particular, it seems to follow, as a necessary consequence, that he might prove the agreement to which such acts referred: but suppose the plaintiff not to be able to prove the agreement, the terms of it being confined to his and the defendant's knowledge would he be entitled to a discovery from the defendant? If the defendant be bound to discover such agreement, merely because the plaintiff had alleged it to have been in part performed, the plaintiff might, by alleging what was false, be placed in a better situation than he would have been in if he had stated the truth. But it would be difficult, in a court of conscience, to main-

contract was never made. So, if the signing by the other party, or reducing the agree-

tain, that falsehood can entitle to such an advantage: for the purpose of investigating the point, I will, however, assume, agreeably to the decision in the *E. of Aylesford*'s case, 2 Stra. 783, and the opinion of Lord Thurlow, in *Whitchurch* v. *Bevis*, that the defendant is bound to discover whether he entered into such parol agreement or not. Suppose the defendant to have confessed the agreement, denying, however, the acts alleged in part performance of it: where plaintiff alleges part performance, it is assumed, that defendant cannot plead the statute; and when the statute cannot be pleaded, it should seem that it cannot be insisted upon by the answer: but where the statute is not insisted on, it seems admitted that a parol agreement confessed shall be decreed to be performed: it would follow, in the above supposed case, that the plaintiff would be relieved from the necessity of proving the acts alleged in part performance; for cui bono put him upon proving the part performance of an agreement confessed, the admission of the agreement being alone a sufficient circumstance to entitle him to a decree. This advantage might encourage the plaintiff untruly to allege a part performance; but I know no mean by which the objection can be obviated; for if the agreement be in part performed, it is but reasonable that it should be completed, and to that the defendant's discovery may be material; and whether it was or was not in part performed, is a point which clearly the defendant may establish by evidence aliunde. I have adverted to another difficulty which may arise from the rule that an agreement in part performed is not within the statute of frauds. The case I stated supposes the defendant to admit certain acts to have been done; but denies

ment into writing, be prevented by fraud, it may be good (5): And although parol agreements are bound by the statute, and agreements are not to be part parol and

(5) *Sir G. Maxwell* v. *Montacute*, Pre. Ch. 526. See also *Sellack* v. *Horris*, 5 Vin. Ab. 521. pl. 31. *Thynn* v. *Thynn*, 1 Vern. 296.

that they were done in part performance of any agreement; or insists that the terms of the agreement, of which they were done in part performance, were not such as stated in the bill. But see *Moore* v. *Edwards*, 4 Ves. 23. *Cooth* v. *Jackson*, 6 Ves 37, in which the above reasoning is very fully considered.

There are various acts which are considered to amount to a part performance of a parol agreement, and some of them are of a nature which necessarily implies some agreement: as where a man is let into possession, the possession must be referred to some title; but to what can it, unless to the agreement of one having right to confer a title? In such a case it might be consistent with the provisions of the statute to allow evidence, to explain the agreement which led to the possession, though the defendant denied that there was any agreement upon the subject; but if the act alleged in part performance be of a more doubtful nature, as retaining possession after the expiration of a lease: in such case, if the defendant denied having agreed to grant a new lease, or to grant it on the terms alleged, it seems very difficult to determine whether the plaintiff ought, or ought not, in respect of the admission of the acts alleged, to be allowed to prove a parol agreement by evidence aliunde. See *Mortimer* v. *Orchard*, 2 Ves. jun. 243.

This note is already drawn out to a greater length than I intended; and as the difficulties which I feel

part in writing, yet a deposit, or collateral security for the performance of the written agreement, is not within the purview of the statute (6.)

(6) *Hales* v. *Cole*, 2 Vern. 617. *Russell* v. *Russell*, 1 Bro. Rep. 269. *Huxford* v. *Carpenter*, 19th April 1785, MSS. *Hankey* v. *Vernon*, 2 Cox's R. 12. *Edge* v. *Worthington*, 1 Cox's R. 211. *Ex parte Bulteal*, 2 Cox's R. 243. But see *Brandon* v. *Bowles*, contra, 25 Nov. 1713.

may have been judicially removed by the late decisions of the court, I shall close it with a few distinctions upon the question, what acts amount to a part performance. The general rule is, that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it; *Gunter* v. *Halsey*, Amb. 586. *Whitbread* v. *Brockhurst*, 1 Bro. Rep. 412. See *Wills* v. *Stradling*, 3 Ves. jun. 379. *Pym* v. *Blackburn*, 3 Ves. jun. 34. The giving of possession is therefore to be considered as an act of part performance; *Stewart* v. *Denton*, MSS. 4th July 1786; but giving directions for conveyances, and going to view the estate, are not; *Clerk* v. *Wright*, 1 Atk. 12. *Whaley* v. *Bagnal*, 6 Bro. P. C. 45. Payment of money is also said to be an act of part performance; *Lacon* v. *Martins*, 3 Atk. 4. But it is said that payment of money is not a part performance. See *Clinor* v. *Cooke*, Schoales and Lefroy's Rep. 40. *Frame* v. *Dawson*, 14 Ves. 388. *Qu.* whether it means payment of the whole, or only a part of the purchase-money? See also *O'Reilly* v. *Thompson*, 2 Cox's Rep. 272; that payment of a sum, by way of earnest, is not; *Seagood* v. *Meale*, Pre. Ch. 560. *Lord Pengall* v. *Ross*, 2 Eq. Ca. Ab. 46. pl. 12. *Simmons* v. *Cornelius*, 1 Ch. Rep. 128. But see *Voll* v. *Smith*, 3 Cha. Rep. 16; & *Anon.* 2 Freem. 128.

SECTION IX.

So where, in consideration of the agreement, the plaintiff had expended great sums of money about the premises, and charged, that part of the agreement was, that the agreement should be put into writing (*f*); there is a difference to be taken, where the money was laid out in lasting improvements,

(*f*) In *Leak* v. *Morrice*, 2 Ch. Ca. 135, the Lord Keeper over-ruled a plea of the statute of frauds, on the ground of its having been agreed, that the terms of the contract should be put into writing; and in *Hollis* v. *Whiting*, 1 Vern. 151, the want of such circumstance was held fatal to the agreement, though the plaintiff alleged that he had expended considerable sums on the premises on the faith of it. But in the case of *Seagood* v. *Meale*, Pre. Ch. 561, it is said, that "where a man on promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the lease, because it was executed on the part of the lessee." This dictum is sanctioned by the spirit of equity, and seems to do away the decisions which require, even under the circumstance of the premises being improved, an averment of its being part of the parol agreement that it should be reduced into writing.

and where for fancy or humour (*g*) (1). And it is clear that a bill would hold, so far as to be restored to the consideration money expended in valuable improvements; for a lease, though void for want of legal ceremonies, yet is a sufficient colour to possess (*h*). But the difficulty seems to be, that the act makes void the estate, but does not say that the agreement itself shall be void. So that, possibly, a man may recover damages for the non-performance of it, and then there is no doubt to decree it in equity (*i*). So where the plaintiff, pursuant

(1) *Deane* v. *Izard*, 1 Vern. 159. *Scagood* v. *Meale*, Pre. Ch. 561. See also *Savage* v. *Taylor*, Forrester, 239.

(*g*) The principle of this distinction extends to purchasers for valuable consideration, and without notice of an adverse title. *Edlin* v. *Bateley*, 2 Lev. 152. *Thomlinson* v. *Smith*, Finch. 378.

(*h*) This rule seems now to prevail, even in courts of law; it having been held, that a plaintiff in ejectment shall not be allowed to recover against such an equitable title, as would be specifically decreed in equity; *Weakly*, ex dem. *Yea* v. *Bucknell*, Cowp. 473. But it may be material to remark, that on this decision being referred to in *Lowther* v. *Andover*, 1 Bro. Rep. 397, Lord Thurlow, C. expressed his surprise, and doubted the law of it.

(*i*) It is certainly a general rule, that courts of equity will, under particular circumstances, enforce the specific performance of agreements, for the non-perform-

to a parol agreement for a building lease, proceeded to pull down part, and build part, and before any lease executed, the owner of the soil died, equity will decree a building lease to be made according to the agreement (2). But the execution in part must be valuable and meritorious. Nor is giving 5 *s.* or 10 *s.* carnest, &c. sufficient (3); but, in these cases, an action at law must be brought, and damages only recovered. For when this court does assist the common law, and enforce the performance of the agreement in specie, it does it upon important reasons, viz. when otherwise there would be a great burthen and penalty upon the party, if, having performed part, by

(2) *Foxcroft* v. *Lister*, cited in *Pike* v. *Williams*, 2 Vern. 456.

(3) *Seagood* v. *Meale*, Pre. Ch. 560. *Pengall* v. *Ross*, 2 Eq. Ab. 46. pl. 12. *Simmons* v. *Cornelius*, 1 Ch. Rep. 128. See s. 8. note (*e*).

ance of which the party would be entitled to damages at law; but as the decreeing of specific performance is in the discretion of the court, it must not be considered as an universal rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance, though, perhaps, he might at law be subject to damages for not completing his purchase. *Davis* v. *Symonds*, 1 Cox's Rep. 402. *Day* v. *Newman*, 2 Cox's Rep. 77. See *Marlow* v. *Smith*, 2 P. Wms. 198. *Lyddel* v. *Weston*, 2 Atk. 19. *Shapland* v. *Smith*, 1 Bro. R. 75. *Cooper* v. *Denne*, 1 Ves. jun. 565. *Pope* v. *Simpson*, 5 Ves. 145. *Rose* v. *Calland*, 5 Ves. 186. *Jowes* v. *Lush*, 14 Ves. 547. *Stapleton* v. *Scott*, 16 Ves. 272.

which he himself has a loss, and the other a benefit, he should not have a reciprocal performance (4).

(4) See c. 1. s. 5. c. 3. s. 1.

SECTION X.

THERE is another branch of the statute (1,) which restrains marriage agreements not made in writing, and signed by the party (*j*). But an agreement by letter (*k*),

(1) Sect. 4.

(*j*) The statute does not extend to mutual promises to marry, but relates only to contracts in consideration of marriage; *Cooke* v. *Baker*, Buller's Ni. Pri. 280. 4to. ed. Stra. 34. 1 Lord Raym. 387.

(*k*) A letter not only takes an agreement in consideration of marriage out of the statute, but also, as before observed, agreements respecting lands, &c. *Ford* v. *Compton*, 2 Bro. Ch. R. 32. *Fowle* v. *Freeman*, 9 Ves. 355. *Western* v. *Russell*, 3 Ves. & B. 187. *Tawney* v. *Crowther*, 3 Bro. C. R. 318: but whenever a letter is relied on as evidence of an agreement, it must be stamped before it can be read, *Ford* v. *Compton*. It must also distinctly furnish the terms of the agreement; *Seagood* v. *Meale*, Pre. Ch. 560. Str. 426. *Clark* v. *Wright*, 1 Atk. 12. *Brodie* v. *S. Paul*, 1 Ves. jun. 326; or it must at least refer to some written instrument, in which the terms are set forth; *Tawney* v. *Crowther*. It must likewise appear, that the other party accepted such

takes it out of the statute (2); for this is a writing signed by him. As to that clause, which relates to the writing, signing, and attesting of wills (*l*), it is said, that the signing of the devisor, in the presence of the witnesses, is not necessary. And this

6) *Bird* v. *Blosse*, 2 Ventris, 361. *Moor* v. *Hart*, 2 Ch. R. 147. 1 Vern. 110. *Wankford* v. *Fotherley*, 2 Vern. 322. *Anon.* Skin. 142.

terms, and acted in contemplation of them; if, therefore, the husband was, at the time of the marriage, ignorant of the promise contained in the letter, equity will not decree upon it; *Ayliffe* v. *Tracey*, 2 P. Wms. 65. Neither will equity decree a portion upon a promise in a letter, if the defendant appear in the same letter to have endeavoured to prevent the marriage, though he was afterwards present at it; *Douglas* v. *Vincent*, 2 Vern. 202. Q. Whether courts of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed, but not executed, varying the terms expressed in the letter? See *Cokes* v. *Mascall*, 2 Vern. 34; or if the terms be varied by parol. See *Jordan* v. *Sawkins*, 3 Bro. Rep. 388. And as a letter, setting forth the terms of an agreement, takes the agreement out of the statute, it being a sufficient signing; so, it seems, it is a sufficient signing, if a person, knowing the contents, subscribe the deed as a witness only. *Welford* v. *Beazeley*, 3 Atk. 503.

(*l*) The clause referred to is the 5th section of the statute, which enacts, that "all devises and bequests of any lands or tenements, deviseable either by force of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, see *Hussey* v. *Grills*, Ambl. 299, shall be in writing, and signed by the party so

statute and that of intestates, were drawn up by C. J. Hale, and the Judge of the

devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of no effect." See *Wild*'s case, 6 Rep. 16, 17, as to the reason why devises were not allowed, except by special custom by the common law. The above clause requiring the devise to be signed by the testator, or by some other person in his presence, and by his express direction, has frequently led to the question, what shall be construed a signing? The first case, in which this question was raised, was *Lemayne* v. *Stanley*, 3 Lev. 1. 1 Eq. Ca. Ab. 403; in which case it was determined, that if the testator write the will with his own hand, though he does not subscribe his name, but seals and publishes it, and three witnesses subscribe their names in his presence, it is a good will; for his name being written in the will, it is a sufficient signing, and the statute does not direct whether it shall be at the top, bottom, &c. But from the case of *Right*, lessee of *Cater* v. *Price*, Dougl. 229, it may be inferred, that the above decision will apply only to those cases where the testator appears to have considered such signing sufficient to support his will, and not to those where the testator appears to have intended to sign the instrument in form. In the case of *Right* v. *Price*, the will was prepared in five sheets, and a seal affixed to the last, and the form of attestation written upon it; and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third, but being unable, from the weakness of his hand, he said he could not do it, but that it was his

Prerogative Courts (*m*). And there are many things in them that are according to

will; and on the following day, being asked if he would sign his will, he said he would, and attempted to sign the two remaining sheets, but was not able. Lord Mansfield observed, that "the testator, when he signed the two first sheets, had an intention of signing the others, but was not able. He therefore did not mean the signature of the two first as the signature of the whole will: there never was a signature of the whole." The next doubt that occurred upon this point was, whether the testator sealing his will was not a signing within the statute; and in *Warneford* v. *Warneford*, 2 Stra. 764, Lord Raymond is reported to have held, that it was; and of the same opinion three of the judges appear to have been, in *Lemayne* v. *Stanley*: but in *Smith* v. *Evans*, 1 Wils. 313, such opinion was said to be very strange doctrine; for that if it were so, it would be easy for one person to forge any man's will, by only forging the names of any two obscure persons dead; for he would have no occasion to forge the testator's hand. And they said, "if the same thing should come in question again, they should not hold, that sealing a will only was a sufficient signing within the statute." But in the case of *Gryle* v. *Gryle*, 2 Atk. 176, Lord Hardwicke seems to have thought, that sealing without signing in the presence of a third witness, the will having been duly executed in the presence of two, would have been sufficient to make it a good will. Upon the attestation of a will, many questions have also arisen. The first seems to have been whether the witnesses must attest the signing by the testator; and, upon this point, the statute not requiring the testator to sign his will in the presence of the witnesses, it has been held sufficient, if the testator

the plan of the civil law; and the constructions have been accordingly (3). And there

(3) Gilb. Rep. 265.

acknowledge to the witnesses that the name is his; *Stonehouse* v. *Evelyn*, 3 P. Wms. 253; *Grayson* v. *Atkinson*, 2 Ves. 254; and *Smith* v. *Codron*, 7th July 1732, cited in *Grayson* v. *Atkinson*. See also *Dormer* v. *Thurland*, 2 P. Wms. 510. See also *Peal* v. *Ongley*, Comyns's Rep. 197. *Ellis* v. *Smith*, 1 Ves. jun. 11. The next question respecting the attestation was, what shall be construed a signing in the presence of the testator: and upon this point, which first came into consideration in *Longford* v. *Eyre*, 1 P. Wms. 740, Lord Macclesfield held, that "the bare subscribing of a will by the witnesses in the same room, did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room, in a clandestine fraudulent way, and then it would not be a subscribing by the witness in the testator's presence, merely because in the same room; but that here, it being sworn by the witness, that he subscribed the will at the request of the testatrix, and in the same room, this could not be fraudulent, and was therefore well enough." So in the case of *Shires* v. *Glascock*, 2 Salk. 688, the testator having desired the witnesses to go into another room, seven yards distant, to attest it, in which room there was a window broken, through which the testator might have seen, the attestation was held good; for that it was enough that the testator might see the witnesses signing, and that it was not necessary that he should actually see them. See also *Davy and Nicholas* v. *Smith*, 3 Salk. 395. And Lord Thurlow, C. in *Casson* v. *Dade*, 1 Bro. Ch. R. 99, relying upon the authority of *Shires* v. *Glascock*, inclined to think a will well attested, where the testatrix could see the witnesses through the window of her carriage, and of the attor-

is the same rule of property in equity as in law (4), and the same exposition of the

(4) *Watts* v. *Ball*, 1 P. Wms. 101.

ney's office. But the above cases turned upon the circumstance of the testator being in a situation which allowed of his seeing the witnesses sign; if, therefore, he be in a position in which he cannot see the signing, it seems such attestation would not be a compliance with the statute; *Eccleston* v. *Pally*, Carth. 79. Holt's Rep. 222. *Broderick* v. *Broderick*, 1 P. Wms. 239. *Machell* v. *Temple*, 2 Show. 288. And in the case of *Hands* v. *James*, Comyns's R. 531, it was determined, that the question, whether present or not, was a fact for the consideration of the jury upon all the circumstances of the case. See also *Croft* v. *Pawlett*, Stra. 1109. It seems also to have been a question, whether the witnesses should not attest the will in the presence of each other? But it was determined, very soon after the statute, that though the witnesses must all see the testator sign, or acknowledge the signing, yet that they may do it at different times; *Anon.* 2 Ch. Ca. 109. Freem. 486. *Cook* v. *Parson*, Pre. Ch. 185. *Jones* v. *Lake*, cited 2 Atk. 177. *Bond* v. *Sewell*, 3 Burr. R. 1773; and the acknowledgement by the testator to one of the witnesses who did not see him sign, is good. See *Addy* v. *Grix*, 8 Ves. 504. *Ellis* v. *Smith*, 1 Ves. 11. As to attestation by a marksman, see *Harrison* v *Harrison*, 8 Ves. 185. It may be proper, in this place, to observe, that as the object of this clause of the statute of frauds was to prevent those impositions which had been practised on persons in extremis, that it is the duty of persons attesting wills of lands, to be satisfied as to the sanity of the testator; for unless he be sane, he cannot be said to have a disposing mind, which is of the very essence of a will; and on this ac-

statute law (*n*). And the rather, because it is a statute of frauds, which it is the

count, the sanity of the testator must be proved; and therefore, if a bill be brought to establish a will against an heir, all the witnesses, if living, must be examined as to the sanity of the testator. *Ogle* v. *Cook*, 1 Ves. 177. *Grayson* v. *Atkinson*, 2 Ves. 454. *Townsend* v. *Ives*, 1 Wilson's Rep. 216. And so strictly do courts of equity insist upon this rule, that they will not dispense with it, though the heir at law, by his answer, state that he believes the will to have been duly made, &c. *Potter* v. *Potter*, 1 Ves. 274; and a compliance with it is the more necessary, as the court will set aside a will, on account of the insanity, even after forty years possession under it, and that, too, against a purchaser. *Squire* v. *Pershall*, 8 Vin. Ab. 169. pl. 13. It may be material, in this place, also to consider who are intended by credible witnesses. "The epithet credible," says Lord Mansfield, "has a clear precise meaning: it is not a term of art, appropriated only to legal notions, but has a signification universally received. It is never used as synonymous to competent. When applied to testimony it presupposes the evidence given." *Wyndham* v. *Chetwynd*, 1 Burrow's R. 417. But it seems, that formerly "the judges were very strict in regard to the credibility of the witnesses; for they would not allow any legatee, nor, by consequence, a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will: for if it were established, he gained a security for his legacy or debt; whereas, otherwise, he had no claim but on the personal assets," 2 Bla. Com. 377. *Helier* v. *Jenings*, 1 Freem. 510. Comyns's Rep. 91. 1 Lord Raymond,

proper business and jurisdiction of a court of equity to suppress.

305. Carth. 514. (See also Lord Mansfield's observations on this case, in *Wyndham* v. *Chetwynd.*) *Hold-fast,* ex dem. *Anstey* v. *Dowsing,* 2 Str. 1253. "These determinations, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish, who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness,) and if, in such case, the testator had charged his real estate with the payment of his debts, the whole, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 G. II. c. 6, which restored both the competency and credit of such legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. That it extends to wills of personal estates, see 17 Ves. 510. The same statute likewise established the competency of creditors, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered on a view of all the circumstances, by the court and jury before whom such will shall be contested; and, accordingly, in *Wyndham* v. *Chetwynd,* 1 Burrows, 414, the testimony of three witnesses, who were creditors, was held to be sufficiently credible, though the land was charged with payment of debts; and the reasons given on the former determinations were said to be insufficient." 2 Bla. Com. 377,

378; and in the case of *Brograve* v. *Winder*, 2 Ves. jun. 632, a witness not interested at the time of the execution of the will, but interested at the time of his examination, was held to be competent. It may be proper here to remark, that a codicil, though not attested, has in some cases, been considered as part of the will, so as to charge real estate, as where the will, duly attested, charged real estate with the payment of legacies; it was held, that legacies, bequeathed by codicil not attested, were well charged on the real estate, *Brudenell* v. *Boughton*, 2 Atk. 268. *Hannis* v. *Packer*, Ambler's Rep. 556. *Habergham* v. *Vincent*, 2 Ves. jun. 404. *Buckeridge* v. *Ingram*, 2 Ves. jun. 665, *Attorney General* v. *Ward*, 3 Ves. 327; because they were not devised out of land like a rent, but only secured by land which was before well devised, *Hyde* v. *Hyde*, 1 Eq. Ca. Ab. 409. Q. Therefore, if the bequest of a legacy by an unattested codicil can be incorporated in the will so as to charge the real estate, if the personal estate be by the will expressly exempted, and the real estate be made primarily applicable to the payment of legacies?

(*m*) "The statute of frauds is often supposed to have been made upon great consideration; on an attentive perusal, however, it will not appear to have been very accurately penned. It seems to be universally understood to be the meaning of the statute, that the testator *must sign in the presence of the subscribing witnesses*; yet there is no express provision for that purpose in the clause (s. 5), describing the solemnities which are to attend the execution. It is as universally understood, that an express written revocation must be executed with the same solemnities as an original will; but in the clause (s. 6), relative to such revocations, the subscription of the witnesses is not directed; while, on the other hand, the signing by the testator in their presence

is, in such case, expressly prescribed." See Mr. Douglas's note to his report of *Right* v. *Price*. The first part of this observation seems also to have occurred to Mr. Justice Fortescue Aland, in *Stonehouse* v. *Evelyn*, 3 P. Wms. 254. See also *Onions* v. *Tryer*, 1 P. Wms. 344. As to implied revocations, see *Goodtitle* v. *Otway*, 7 T. Rep. 415.

(*n*) And therefore equity, in the devise of a trust, will require a strict observance of all those requisites which are prescribed by the statute as necessary to devises of land; *Wagstaff* v. *Wagstaff*, 2 P. Wms. 261. But if the devisor be prevented by the fraud of the heir from making, or from completely executing, or from republishing his will, equity will convert the heir into a trustee for the devisee. See *Sellack* v. *Harris*, 5 Vin. Ab. 521. pl. 31. *Vane* v. *Fletcher*, 1 P. Wms. 352.

SECTION XI.

AND it has been said, that where there is a written agreement, the whole sense of the parties is presumed to have been comprised therein (1), and it would be dangerous to make any addition (*o* in cases where there

(1) *Cheney's* case, 5 Co. 68. 1 Roll's Ab. 379. *Christmas* v. *Christmas*, Sel. Ca. Ch. 20. *Lord Irnham* v. *Child*, 1 Bro. Rep. 92.

(*o*) Where an agreement in writing is executed, (but where it is only executory, and specific performance is

does not appear any fraud in leaving out any thing. Yet if by proof it appears that

prayed, see *Higginson* v. *Cloves*, 15 Ves. 516,) it were not only against the express provisions of the statute of frauds, but also against the policy of the common law, to allow of parol evidence, for the purpose of adding to, or varying the terms of the agreement. *Parteriche* v. *Pawlett*, 2 Atk. 383. *Tinney* v. *Tinney*, 3 Atk. 8. *Binstead* v. *Coleman*, Bunb. 65. *Meers* v. *Ansell*, 5 Wils. 275. *Hare* v. *Sherwood*, 3 Bro. R. 168. *Bridges* v. *Dutchess of Chandos*, 2 Ves. jun. 417. But it may be wholly waived by parol, *Price* v. *Dyer*, 17 Ves. 363; or it may be shewn that some material part of the agreement was omitted by fraud, or that the intention of the parties was mistaken and misapprehended by the drawers of the deed; in such cases, it seems, evidence will be admissible, even though the agreement be executed. *Langley* v. *Brown*, 2 Atk. 203. *Towers* v. *Moor*, 2 Vern. 98. *Hill* v. *Wiggett*, 2 Vern. 547. *Harvey* v. *Harvey*, 2 Ch. Ca. 180. *Uvedale* v. *Halfpenny*, 2 P. Wms. 151. *Rogers* v. *Earl*, Dick. 294. *Barstow* v. *Kilvington*, 5 Ves. 593. *Marquis of Townshend* v. *Strangroom*, 6 Ves. 328. *Countess of Londonderry* v. *Wayne*, 2 Eden's Rep. 170. But Q. whether there must not be some writing to proceed upon; *Doran* v. *Ross*, 3 Bro. Ch. Rep. 27. a fortiori—will such evidence be admissible, where the agreement is executory? *Joynes* v. *Statham*, 3 Atk. 388. *Baker* v. *Paine*, 1 Ves. 456. It may be material to observe, where evidence dehors, the deed is admitted to shew what was the consideration of the agreement, that the consideration to be proved must be consistent with the consideration stated; as in *Rex* v. *the Inhabitants of Scammonden*, 3 Term Rep. 474. Fulbeck's Parallel, p. 9; see *Hartop* v. *Hartop*, 17 Ves. 192; and if the

a settlement was intended, and the articles agree with the intent of the parties, but the

deed specify the consideration to have been a sum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. *Clarkson* v. *Hanway*, 2 P. Wms. 204. *Peacock* v. *Monk*, 1 Ves. 128. Nor, if the stated consideration fail, can evidence be admitted to support the conveyance as a gift; *Bridgman* v. *Green*, 2 Ves. 627. *Ramsden* v. *Jackson*, 1 Atk. 294. *Hawes* v. *Wyatt*, 3 Bro. Rep. 156. see *Filmer* v. *Gott*, 7 Bro. P. C. 70; and though the deed specify a particular consideration, and "other considerations," generally, no consideration but that expressed shall be intended; *Lacy* v. *Whetston*, Cro. Eliz. 343. But Q. whether other considerations might not be proved? I do not propose, in this place, to consider the cases in which parol evidence is admissible to explain a will; it may therefore be sufficient to state generally, that parol evidence is admissible for the purpose of explaining a latent ambiguity, either in a deed or will; *Hussey* v. *Berkeley*, 2 Eden's Rep. 194; Lord Bacon's Maxims, rule 23. *Fonnereau* v. *Poyntz*, 1 Bro. Rep. 472. *Maybank* v. *Brooks*, 1 Bro. Rep. 84. *Pole* v. *Lord Somers*, 6 Ves. 309. *Thomas* v. *Thomas*, 6 Term R. 671. *Ld. Walpole* v. *Ld. Cholmondeley*, 7 Term R. 138; in an agreement see *Higginson* v. *Cloves*, 15 Ves. 514; and also for the purpose of rebutting an equity or trust raised by implication; *Petit* v. *Smith*, 1 P. Wms. 7. *Lady Glanville* v. *Duchess of Beaufort*, 1 P. Wms. 114. *Gainsborough* v. *Gainsborough*, 2 Vern. 252. *Lamplugh* v. *Lamplugh*, 1 P. Wms. 113. *Littlebury* v. *Buckly*, cited 2 Vern. 677. *Bachelor* v. *Searle*, 2 Vern. 763. *Duke of Rutland* v. *Duch. of Rutland*, P. Wms. 210. *Mallabar* v. *Mallabar*, Forrester, 78. *Lake* v. *Lake*, 1 Wils. 313. Ambler, 126.

settlement does not, it shall go according to the articles, although the settlement was made before the marriage (2), when it may be supposed to have been waived, as it might be before marriage, though not afterwards (*p*). So where the husband when he proposed the treaty of marriage, offered to

(2) *Honor* v. *Honor*, 2 Vern. 658. 1 P. Wms. 123. *West* v. *Erriss-sey*, 2 P. Wms. 349. 3 Bro. P. C. 327. *Roberts* v. *Kingsley*, 1 Ves. 238.

Brown v. *Selwyn*, Forrester, 240. *Lord W. Gordon* v. *Marquis of Hertford*, 2 Madd. R. 120. *Ramsbottom* v. *Gosden*, 1 Ves. & B. 165. But if evidence be adduced to rebut the equity or trust raised by implication, such evidence may be encountered by other evidence, to support such equity or trust; *Rachfield* v. *Careless*, 2 P. Wms. 159. *Nourse* v. *Finch*, 1 Ves. jun. 544.

(*p*) The cases referred to in the margin do not wholly bear out our author's propositions; for in all those cases, the settlement purports to have been made in pursuance and performance of the articles; which circumstance reconciles the decisions with the distinction taken by Lord C. Talbot, in *Legg* v. *Goldwire*, Forrester, 20, that "where articles are entered into before marriage, and the settlement be made after marriage, different from those articles, (as if by the articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath power to bar the issue,) this court will set up the articles of settlement. But when both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall control the articles." The same distinction had been pointed out, and insisted on, in

to settle 500*l.* per ann. jointure, and after the marriage took notice, that the jointure

Burton v. *Hastings*, Gilbert's Rep. 113, 114; but it was not adopted nor recognized by the court. Courts of equity will not only vary the terms of a settlement in consideration of marriage, when made after marriage or before marriage, if expressed to be in pursuance of the articles; but will also modify the limitations of the articles, so as to answer and effectuate the real end and intention of the parties, notwithstanding the legal operation of the words in which the articles are expressed. For courts of equity do not consider themselves tied up to an implicit observance of the same rule with courts of law, in respect to those limitations, which are the immediate objects of their jurisdiction; namely, limitations which do not include or carry the legal estate. See Mr. Fearne's Essay on Contingent Remainders, p. 124, 4th edit. This most able writer having enumerated all the cases upon that subject, and pointed out the principles to which they are to be respectively referred, observes, that "upon the whole, the general doctrine upon this subject appears to be, that in the cases of articles before marriage, containing limitations that would give the parents, or either of them, such an estate tail as would enable the father alone, during the coverture, or the surviving parent afterwards, to bar the issue of a marriage under a legal settlement, limiting the estate in the same words, equity will rectify it, and make a strict settlement, unless the issue is otherwise provided for than by the limitations to the heirs, &c. or from other limitation, or provision in other lands, it appears that the parties knew and intended the distinction. But the court will not interfere, if both articles and settlement are made before

settled was not so much, and talked of making it up so much; although there was no covenant or agreement proved, whereby he bound himself to make a jointure of that value, yet the heir shall be decreed to make it up (3). For a covenant is but an evidence of the agreement; and therefore, if there be any other evidence, which proves the agreement, it is as good (4).

(3) *Benson* v. *Bellasis*, 1 Ves. 17. *Gleg* v. *Gleg*, 5 Vin. Ab. 511. pl. 21.

(4) See c. 3. s. 1. (2). *Brice* v. *Carr*. 1 Lev. 47. *Norris*'s case, Hard. 178.

marriage, unless the settlement in that case, be expressed to be made in pursuance of the articles: for the court will suppose that the parties had altered their intention, with respect to the terms of their marriage; which they may do before the marriage, though not afterwards; and that the settlement was made in pursuance of such new agreement, and not of the articles, but when it is said to be made in pursuance of the articles, all room for such a supposition is precluded." Fearne's Con. Rem. 155, 156. However, it is material to observe, that, in those cases, courts of equity will not interpose to the prejudice of purchasers for valuable consideration and without notice. *West* v. *Errissey*, 2 P. Wms. 349. *Powell* v. *Price*, 2 P. Wms. 535. *Warwick* v. *Warwick*, 3 Atk. 291. Nor will they vary the settlement, unless the articles themselves be produced; *Cordwell* v. *Macrill*, Amb. Rep. 515. though evidence be offered to shew what the instructions were; *Asherton* v. *Rooke*, 3 Vin. Ab. 366. nor if the settlement after marriage secure an equivalent. *Glanville* v. *Payne*, 2 Atk. 39.

SECTION XII.

And so much for the agreement of the party that conveys. But an assent on the part of the person that takes, is also essential to all conveyances and contracts; for where a man is to be vested with an interest, his acceptance is necessary (1); otherwise, of a bare authority only (*q*). Yet this is not to be compared with such collateral acts or circumstances, as, by the positive law, are made the effectual part of a conveyance, viz. livery of seisin, attornment (*r*), and sometimes entry of the party; as in case of exchanges (*s*), or the like. For where an act is done for a man's benefit, his agreement is implied till he dis-

(1) *Thompson* v. *Leach*, 2 Ventr. 198. 2 Salk. 618. *Curtise* and *Cottel's* case, 2 Leon. p. 72. pl. 97. 5 Vin. Ab. 508. pl. 1. *Alderson* v. *Temple*, 4 Burr. 2235.

(*q*) See *Thompson* v. *Leach*, 2 Ventr. 198, in which this subject is very elaborately discussed by Ventris, J. See also *Butler* and *Baker's* case, 3 Co. 26 Hob. 171.

(*r*) The necessity of attornment is in most cases taken away by the statutes 4 Anne, c. 16. s. 9; and 11 G. II. c. 19. s. 11.

(*s*) Upon an exchange, or on partition, the parties have neither freehold in deed nor in law before they enter. Co. Litt. 266. b.

agrees; because no man can be supposed to be unwilling to do that which is for his advantage. And this does not hold only in conveyances, but in the gift of goods or chattels (2), whether in possession or action (*t*). But the donee may make refusal in pais; and hereby the property and interest shall be divested out of him; for a man cannot have an estate put into him in spite of his teeth. But when a freehold is vested in him, it cannot be divested by nude parol in pais (*u*); but remains in him

(2) *Butler* and *Baker*'s case, 3 Co. 26. b. *Harris* v. *De Bervoir*, Cro. Jac. 687. *Wankford* v. *Wankford*, 1 Salk. 321.

(*t*) Q. Whether a gift is not countermandable by the donor before actual acceptance by the donee: see *Atkin* v. *Barwick*, Stra. 165. 10 Mod. 432. Jenkins Cent. p. 109. case 9.

(*u*) "As an act in pais will, in some cases, amount to an agreement, so an act in pais, in such cases, may amount to a disagreement; as where the tenant by deed doth enfeoff the lord and a stranger, and makes livery to the stranger in the name of both; in this case, if the lord by word disagree to the estate, it is nothing worth; and on the other side, if he enter into the land generally, and take the profits, this act will amount to an agreement to the feoffment; but if he enter into the land, and distrains for his signiory, this act amounts to a disagreement of the feoffment, and will divest the freehold out of him. And yet, in some cases, a claim by word will direct an entry to be an agreement to one estate, and a disagreement to another; as, if lands be given to husband and wife in tail, and after the statute of 32

always till disagreement in a court of record, to the intent that the tenant of the præcipe may be the better known (3); except in some special cases.

(3) *Butler* and *Baker*'s case, 3 Co. 26. b. Popham, 89. 2 Leon. pl. 97.

H. VIII. the husband aliens the land to the use of him and his heirs, afterwards devises it to his wife for life, and dies; the wife enters, claiming by word the estate for life, this is a good disagreement to the estate of inheritance, and a good agreement to the estate for life; for there is not any doubt of the tenant to the præcipe, and the act and the words work together. But if the wife, before her entry, agrees by word to one estate, and disagrees to the other, this is nothing worth." 3 Co. 26. b.

CHAP. IV.

Of the Subject Matter of Covenants.

SECTION I.

It follows in order, that we treat of the subject matter of covenants. And here it is a certain rule, that agreements receive all their force from the ability of the parties, and can never extend further (*a*); for of so much, and no more, have they a liberty of disposing (1). If, therefore, they know on both sides that the thing is absolutely impossible, and are privy to each other's knowledge as to this point, the en-

(1) Heineccius J. N. & G. c. 14. § 397. 401.

(*a*) This rule only applies to such undertakings as are impossible to all men, and with the nature of which every man must be presumed to be acquainted; and it is observable, that though our author lays down the rule, that the ability of the parties determines the measure of the obligation; yet, in the illustration of the rule, he shews that damages may be recovered on an agreement impossible to be performed, if the party undertaking alone knew of the impossibility. And this is agreeable to the principles laid down by Puffendorff, from whom our author seems to have drawn his distinction. Puffendorff, b. 3. c. 7. s. 2.

gagement cannot be esteemed a deliberate and serious act, or be of any validity (1). But if the undertaker only knew the impossibility, and not the other party, he shall pay him the damage that he sustains by being thus imposed upon (2). And so, if he neglected to weigh his own strength, so as to undertake an impossibility, which, upon due consideration, he might have found to be such (*b*). And in the civil law, an impossible condition avoided the contract; for they concluded, that by the adding a condition, which they knew to be impossible, the parties could not intend the agreement should be of any force (3). Yet it seems, in the law of England, the rule is not the same of conditional as of other contracts. For by that law, an agreement to do a thing in itself impossible, or out of

(1) Co. Litt. 206. a.

(2) *Thornborow* v. *Whitacre*, 2 Lord Raym. 1164.

(3) Inst. lib. 3. tit. 20. 11. Dig. lib. 45. tit. 1. 7. Domat. b. 1. tit. 1. s. 4. 13.

(*b*) If A. for money paid him by B. will undertake to do an impossible thing, an action shall lie against him for not performing it; as in case of a bond with an impossible condition, the bond is single: so where a man will for a valuable consideration, undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages. P. Holt, C. Justice, *Thornborow* v. *Whitaker*, 2 Ld. Raymond, 1164, 5. But see *Putterton* v. *Agnew*, 1 Salk. 172. As to the distinction between a legal and physical impossibility, see 1 Freeman, 83.

the power of man, is void in all cases (*c*). And they make this difference between an

(*c*) Lord Coke, in considering the effect of impossible conditions, appears to have classed them under four distinct heads: "1st, Where they are possible at the time of their creation, but afterwards become impossible; and he distinguishes that impossibility which is produced by the act of God, and that which is produced by the act of the party. 2dly, When they are impossible at the time of their creation. 3dly, When they are against law, as mala prohibita, or mala in se. 4thly, When they are repugnant to the grant by which they are created, or to the estate to which they are annexed." (See Co. Litt. 206. a. note (1), Hargrave and Butler's ed.) "In any of which cases," Sir William Blackstone observes, "If they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant: but if the condition be precedent, or to be performed before the estate vests, the grantee shall take nothing by the grant; for he hath no estate until the condition be performed." 2 Bla. Com. 156, 157. See *Popham* v. *Bamfield*, 1 Vern. 83. *Lord Falkland* v. *Bertie*, 2 Vern. 340. *Harvey* v. *Aston*, 1 Atk. 376. *Roundel* v. *Currer*, 2 Bro. Ch. R. 67. This distinction between conditions precedent and subsequent is often mentioned in courts of equity; yet the prevailing distinction in equity, as to conditions, is where compensation can be made, and where not; and therefore, where A. conveyed lands to B. &c. upon trust, that if C. the son of A. within six months after the death of A. should secure to trustees 500*l.* for the younger children of C. then after such security given to convey to C. and his heirs, and until the time for giving such security in trust for the eldest son of C. and in default of such

impossible and an uncertain limitation of an estate; that the first cannot be intended any part of the contract, nor to have been the subject of deliberation; for no man in his senses deliberates about what is absolutely out of his power; but an uncertain limitation is void (4) upon another account, viz. because the court cannot ascertain it. But as to impossible conditions, if they be precedent, the interest will never vest (5); but if subsequent, the deed is single; for it shall be intended, that he knew he could not perform it, and so did not design to defeat the deed.

(4) Shepherd's Touchstone, c. 23. p. 414. *Anon.* 1 Mod. 180.

(5) *Feltham* v. *Cudworth*, 2 Ld. Raymond, 716. Co. Litt. 206. *Popham* v. *Bamfield*, 1 Vern. 83. 1 Roll's Ab. 419. 5 Vin. Ab. 110, 111. 2 Comyns's Dig. p. 325.

security, to convey to such eldest son and his heirs. C. died before such security given: yet this condition precedent being only in the nature of a penalty, the intent of the trust shall be regarded, which was to secure 500*l.* to the younger children; *Wallis* v. *Crimes*, 1 Ch. Ca. 19. See *Glasscock* v. *Brownell*, Finch. 178. *Pitcairne* v. *Brace*, Finch. 403. *Woodman* v. *Blake*, 2 Vern. 222. *Lord Falkland* v. *Bertie*, 2 Vern. 339. But though equity will, under some circumstances, relieve against the breach of a condition precedent where damages are certain, yet, it seems, that they will not where the damages accrued are contingent, and cannot be estimated; *Sweet* v. *Anderson*, 5 Vin. Ab. 93. pl. 15. see c. 6. s. 4.

SECTION II.

But a man may bind himself to do any thing, which is not in itself impossible (1); and it is at his peril if he does not perform it (*d*). And the legal distinction between a near and remote possibility (2) having no foundation in reason is not regarded in equity (*e*); and therefore since the statute of 21 H. 8. cap. 15, when long leases could first be taken with security, a remainder of a term for years was admitted there, and deemed as strong an interest as an estate of freehold and inheritance (*f*). So if A.

Heineccius J. N. & G. c. 14. s. 397.

(1) 1 Roll's Ab. 419. 5 Vin. Ab. 110.

(2) *Cholmley's* case, 2 Co. 51.

(*d*) See 5 Vin. Ab. 110, 111; 1 Roll's Ab. 419, 420; where the cases illustrative of this rule are collected. See also *Smith* v. *Morris*, 2 Bro. Rep. 311.

(*e*) There are two kinds of possibilities: the one a bare possibility, that which the heir has from the courtesy of his ancestor, and which is nothing more than a mere hope of succession; and a possibility coupled with an interest, such as an executory devise, or springing use. The first kind of possibility is not regarded at law, though, under particular circumstances, it is in equity: the latter is now, under certain restrictions, equally regarded both at law and in equity.

(*f*) It is certainly true that the remainder of a term, after a limitation for life, was formerly held to be void

covenants, &c. in case he dies without issue, to give his lands in D. to his brother, this shall be carried into execution, upon the falling of the contingency, although the limitation be after a dying without issue (3). So although a grant (4) of a possibility is not good in law (g), yet a possibility of a

(3) *Goylmer* v. *Paddiston*, 2 Vent. 353. See *Duke of Norfolk*'s case, 3 Ch. Ca. 1. *Fletcher*'s case, 1 Ca. Ab. 193.

(4) *Cheddington*'s case, 1 Co. 154. b. *Fullwood*'s case, 4 Co. 66. b.

at law, because by possibility the life might not expire during the term; Dyer, 74. pl. 18. 1 Roll's Ab. 610. pl. 4; but equity considering this rule as against natural justice, and a serious impediment to farmers of long leases, anxious to make provision for their families, allowed such limitations to operate by way of trust; the good effects of which induced courts of law to relax their former rule in favour of such limitations in a will, which are now allowed to operate at law by way of executory devises; *Matthew Manning*'s case 8 Co. 95. But, as executory devises were originally treated in equity as limitations of a trust, such limitations over, of a term in trust, are allowed to prevail in equity even in a deed; *Warmstrey* v. *Tanfield*, 1 Ch. Rep. 16. *Duke of Norfolk*'s case, 3 Ch. Ca. 1. 1 Eq. Ab. 192. *Massenburgh* v. *Ash*, 1 Vern. 234, 304.

(g) "The wisdom and policy of the sages and founders of our law," says Lord Coke, "have provided that no possibility, right, title, nor thing in action, shall be granted or assigned to strangers; for that would be the occasion of multiplying contentions and suits," &c. "But all right, title and actions, may be released to the terre-tenant for the same reason, for avoiding con-

trust in equity might be assigned (5). So a covenant to settle lands, of which he had only a possibility of descent (*h*), shall

(5) *Warmstery* v. *Tanfield*, 1 Ch. Rep. 16. *Goring* v. *Bickerstaffe*, 1 Ch. Ca. 8.

Pollex. 31. *Wind* v. *Jekyll*, 1 P. Wms. 572. *Vezey* v. *Pinwell*, Pollexfen, 44. *Higden* v. *Williamson*, 3 P. Wms. 132. *Kimpland* v. *Courteney*, 2 Freem. 250. *Theobalds* v. *Duffoy*, 9 Mod. 101. *Duke of Chandos* v. *Talbot*, 2 P. Wms. 608.

tentions and suits;" *Lampet*'s case, 10 Co. 48. a. And though a possibility, or contingent interest, be not grantable at law, yet, whether in real or personal estate, it is transmissible and deviseable; *Sheriff* v. *Wrotham*, Cro. Jac. 509. *Pinbury* v. *Elkins*, 1 P. Wms. 566. *King* v. *Withers*, Forr. 117. *Gurnel* v. *Wood*, 8 Vin. Ab. 112. pl. 38. *Chauncey* v. *Graydon*, 2 Atk. 616. *Peck* v. *Parrott*, 1 Ves. 236. *Vezey* v. *Pinwell*, Pollexfen, 44. *Jones* v. *Roe*, 3 Term Rep. 88. *Selwyn* v. *Selwyn*, 2 Burr. Rep. 1131. See also *Barnes* v. *Allen*, 1 Bro. Rep. 181. Fearne's Con. Rem. 444. The cases referred to in the margin abundantly prove, that interests in contingency, respecting personal estates, are assignable in equity; but it may be material to observe, that in the cases of assignments of such interests equity requires the assignee to shew that he gave a valuable consideration for the interest assigned, and therefore will not interpose to assist volunteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where such assignments are made, not for consideration of money, but in consideration of love and affection, and advancement of children: *Wright* v. *Wright*, 1 Ves. 409.

(*h*) A distinction appears to have been taken in *Wright* v. *Wright*, 1 Ves. 409, between assignments of a possibility of an inheritance, and assignments of a

be carried into execution in equity (6); for the court does not bind the interest, but, instead of damages at law, enforce the performance in specie. But the law does not admit of grants, or other conveyances, except there be a foundation of an interest in the grantor, and he has the thing either actually or potentially. Yet of declarations precedent it does allow, provided it be afterwards enforced by some new act; as, if a man covenants to purchase the manor of D. and to levy a fine of it before such a day, to certain uses expressed in the indenture

(6) *Hobson* v. *Trevor*, 2 P. Wms. 191. *Beckley* v. *Newland*, 2 P. Wms. 182.

possibility of a chattel real; the distinction was, however, overruled; and the cases of *Beckley* v. *Newland*, and *Hobson* v. *Trevor*, were referred to by Lord Hardwicke as conclusive upon the point. It is observable that Lord Kenyon, C. J. in the case of *Jones* v. *Roe*, 3 Term Rep. 88, put the case of an heir dealing in respect of his hope of succession as a void contract; it being a bare possibility, and not the subject of a disposition during the life of the ancestor: from which it may be inferred, that damages could not be recovered at law for non performance of such a contract; and yet it appears, from the above cases of *Buckley* v. *Newland*, and *Hobson* v. *Trevor*, that such a contract would be decreed in equity, if for a valuable consideration. This, therefore, may be considered as an instance, in which a court of equity will decree the specific performance of a contract, though damages could not be recovered at law for the non-performance of it.

of covenants, this deed to lead the uses will be sufficient, though the land is purchased after; because there is a new act to be done, viz. the fine (*i*). But if I covenant with my son, in consideration of natural love, to stand seised to his use of the lands which I shall after purchase, yet the use is void; the reason is, because there is no new act to perfect this beginning (*k*), and I had nothing at the time of the covenant (7). So if I mortgage land, and after covenant with J. S, in consideration of money, that after entry for the condition broken, I will stand seised to the use of the said J. S, and I enter, and this deed is enrolled, and all

(7) *Yelverton* v. *Yelverton*, Cro. Eliz. 401, 2 Roll's Ab. 790.

(*i*) The case admitted in *Yelverton* v. *Yelverton*, Cro. Eliz. 401; supposes no other uses to have been limited at the time of levying the fine; which may be a material circumstance, where there appear to be two deeds limiting distinct and inconsistent uses. See *Jones* v. *Morley*, Holt's Rep. 321.

(*k*) Though a covenant to stand seised of lands to be after purchased be void at law and in equity, unless there be some new act to be done; because a covenant to stand seised presupposes seisin; Gilb. Uses, 116, 117; yet it seems, that a covenant to settle lands of such a value will charge after-purchased lands, though the covenanter had none at the time of executing the covenant; *Tooke* v. *Hasting*, 2 Vern. 97. But see *Deacon* v. *Smith*, 3 Atk. 329.

within the six months, yet nothing passes (*l*), because this enrolment is no new act (*m*), but only a perfective ceremony of the first deed of bargain and sale (8). And the law is the stronger in this case, because of the vehement relation which the enrolment has to the time of the bargain and sale, at which time I had nothing but a bare condition. So the statutes of wills (9) of land require, that the devisor should be seised (*n*)

(8) Referred to in *Yelverton* v. *Yelverton*, Cro. Eliz. as having been decided in 20 Eliz. but neither the name of the case nor of the court is mentioned.

(9) 32 H.8.c.1. 34, 35 H.8. c.5. 12 Car. 2. c.24.

(*l*) Conveyances by bargain and sale are, in this particular, less operative than a feoffment or fine; for by a feoffment or fine, all uses and possibilities are conveyed; but it is otherwise by bargain and sale. *Anon.* 1 Leo. 33. *Edwards* v. *Slater*, Hardres, 416.

(*m*) This mode of conveying land is created and established by the 27 H. VIII. c. 10, which executes all uses raised; and as this introduced a more secret way of conveyancing than was known to the policy of the common law, the enrolment of the deed of bargain and sale was made necessary by the 27 H. VIII. c. 16, and as, till enrolment, the conveyance is inchoate and imperfect, the lands remain in the bargainor; but when the conveyance is completed by the enrolment, relation shall be had to the delivery of the deed, and the bargainee shall be considered as seised of the land from such period; Sheppard's Touchstone, Bargain and Sale.

(*n*) But though after-purchased freehold lands will not pass by a will without republication, (that a codicil duly executed, is a republication, see *Barnes* v. *Crow*,

of the land at the time of making his will (10). But a man may devise things personal (*o*), which he has not; for the legacy

(10) *Brett* v. *Rigden*, Plowd. 343. *Bunter* v. *Cook*, 1 Salk. 237. Holt's Rep. 249. 1 Bro. P. C. 199. *Strode* v. *Falkland*, 3 Ch. Rep. 100. 3 Com. Dig. 18.

4 Bro. Rep. 10. *Pigott* v. *Waller*, 7 Ves. 98), the statute requiring the devisor to be seised at the time of making his will; yet, if the devisor at the time of making his will, has contracted for land, so that he has an equitable estate in such lands, they will pass by general and sweeping words; *Davie* v. *Beardsham*, 1 Ch. Ca. 39. *Prideaux* v. *Gibbon*, 2 Ch. Ca. 144. *Allen* v. *Allen*, Moseley, 262. *Milner* v. *Mills*, Moseley, 123. *Potter* v. *Potter*, 1 Ves. 437. *Gibson* v. *Lord Montfort*, 1 Ves. 494. *Foley* v. *Percival*, 4 Bro. Rep. 420; *Holmes* v. *Barker*, 2 Madd. R. 462; and the circumstance of a day subsequent to the date of the will being agreed on for the execution of such contract, will not vary the case; *Greenhill* v. *Greenhill*, Pre. Ch. 320; but the articles must have been entered into before the making of the will; *Langford* v. *Pitt*, 2 P. Wms. 629; and they must be such as a court of equity would have enforced in specie; *Potter* v. *Potter*, 1 Ves. 437. And though the specific lands cannot afterwards be had, the money will be bound by the contract, *Whitaker* v. *Whitaker*, 4 Bro. C. R. 31; but see *Green* v. *Smith*, 1 Atk. 572. See also *Pulteney* v. *Lord Darlington*, 1 Bro. Rep. 226, 227; and *Broome* v. *Monck*, 10 Ves. 597. where the cases upon this head are distinguished and classed.

(*o*) In *Bunter* v. *Cook*, the court of King's Bench doubted whether a chattel real, acquired after the making of the will, would pass by it; but that doubt seems to have been since done away; for in *Wind* v. *Jekyll*,

passes not by the will, but by the assent of the executor, to whom the will is only directory (11). And whatever thing would come to my executors, I may dispose of by my will, as a right of a term, or a thing in action when recovered: for the executor has his authority only to fulfil the will (12.) But at common law, what should not be done by my executors, but by my heir, could not be devised as a possibility, &c. unless vested with an interest (*p*): yet, it seems, since the statute of uses, the devisee may take benefit of it by an equitable construction.

(11) *Bunter* v. *Cook*, Salk. 237. *Sayer* v. *Sayer*, 2 Vern. 688. *Masters* v. *Masters*, 1 P.Wms. 424.

(12) *Vesey Pinxell*, Pollexf. 44. *Kimpland* v. *Courteney*, 2 Freem. 250. *Theobalds* v. *Duffoy*, 9 Mod. 101. 2 P. Wms. 608.

1 P. Wms. 575, Lord C. Parker held, that such an interest would clearly pass, and stated the reason of the difference between freehold and personal interests, acquired subsequent to the making of the will, to be "that with regard to the real estate bought after the making the will, supposing that not to pass, still there is one in law capable of taking it, viz. the heir; but as to the personal estate, if the executor, though appointed before the acquiring thereof, does not take it, it is uncertain who shall."

(*p*) Such an interest was held, in *Marks* v. *Marks*, Pre. Ch. 486, to be descendible; but it may be proper to observe, that it vests not in the person who is heir at law at the time of the death of the first purchaser of such possibility, but in such person as may be his heir at law at the time of the contingency happening;

Goodright v. *Searle*, 2 Wilson, 29. Fearne, Exec. Dev. 448, 3d ed. And it seems now to be finally settled, that a possibility clothed with an interest is not only descendible, but devisable; *Selwyn* v. *Selwyn*, 2 Burrows's Rep. 1131. *Moor* v. *Hawkins*, 2 Eden's Rep. 342; but see *Doe* v. *Tomkinson*, 2 M. & S. 165. *Jones* v. *Perry*, 3 Term. Rep. 88, and may be made a subject of contract, *Hobson* v. *Trevor*, 2 P. Wms. 191.

SECTION III.

And even at law a man is bound to do all that lies in his power (1); so that if part of the agreement becomes impossible by the act of God, that does not discharge the rest (*q*), although it were in the disjunctive,

(1) Litt. Sec. 352. *Thornborow* v. *Whitacre*, 2 Lord Raymond, 1165.

(*q*) The case here referred to is probably an anonymous case, 1 Salk. 170, where the condition was to make the obligee a lease for life by such a day, or pay him 100 *l.*—Obligee died before the day, and adjudged that his executors should have the 100 *l.* per Treby, C. J. And the ground of *Laughter*'s case, 5 Rep. 21, was denied to be universal. The reason of the judgment in *Laughter*'s case is reported by Lord Coke to have been, that "where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part; for the condition is made for the benefit of the obligor, and shall be taken beneficially

and he is deprived of his election. So if the whole were at first impossible, yet if it may become possible, before he is compelled to do it, it is not void; for the law respecteth the right of possibility, and will have nothing to be void that by possibility may be made good. As where a dean and chapter (2), before the disabling act, made a lease for him, and he hath election to perform the one or the other for the saving of the penalty of his bond; and when one part is become impossible by the act of God, it is as beneficial for him, as if that part of the disjunctive which is become impossible, had been the only condition of the bond. And so when one became impossible by the act of God, which by no industry he could perform, his bond is saved, although he doth not perform the other, quia impotentia excusat legem." *Graydon* v. *Hicks*, 2 Atk. 18. *Harvey* v. *Aston*, 1 Atk. 361. *Jones* v. *Suffolk*, 1 Bro. C. R. 529. In *Studholme* v. *Mandell*, 1 Lord Raym. Rep. 279, the court are reported to have said, that " the rule and reason in *Laughert*'s case ought not to be taken so largely as Coke has reported, but according to the nature of the case." The rule, however, was allowed to be good law, and has been followed in many subsequent cases; *Wood* v. *Bates*, Sir William Jones's Rep. 171. But if the condition consist of two parts, of which one was not possible at the making of the condition, the other ought to be performed; 21 Ed. III. 29, b. *Mallory*'s case, 5 Rep. 112, a. s. 5. See 5 Vin. Ab. Condition (G. c.)

(2) *Dr. Bettesworth* v. *Dean and Chapter of St. Paul's*, Sel. Ca. Ch. 66. 3 Bro. P. C. 389. Grounds and Rudiments of Law and Equity, pl. 254. *Parry* v. *Brown*, 3 Ch. Rep. 6. 1 Ch. Ca. 23. *Campbell* v. *Leach*, Amb. 740.

for ninety-nine years, and covenanted to renew, at the expiration of the ninety-nine years, for ninety-nine years more; although the covenant is entire, yet they ought to make such lease as is in their power, viz. for forty years, which was allowed them by the statute.

(r) From the rule laid down in *Brewster* v. *Kitchen*, 1 Salk. 198; that where a man covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed; it might be inferred, that the Dean and Chapter of St. Paul's were relieved from their covenant to renew, the statute having restrained them from granting leases for so long a term as was agreed for: but this reasoning is by no means agreeable either to the rules of law, or principles of equity; for lex nemini facit injuriam, is an established rule of law: but the statute would be made to work a wrong contrary to its spirit or provision, if it wholly annulled an agreement which might take effect in part, without prejudice to the object of the legislature; still less could such an inference be reconciled with the principles of equity, which treat the performance of contracts as the discharge of a moral duty as well as of a legal obligation; and therefore, where A. having power to lease for 10 years, leaseth for 20 years, the lease for 20 years shall be good for 10 years; *Pawsey* v. *Bowen*, 1 Ch. Ca. 23. *Campbell* v. *Leach*, Amb. 740. But equity will not decree an underlease on an agreement to assign, though it appear that the assignment cannot be made without a forfeiture; for the defendant in agreeing to assign, might intend to discharge himself from covenants to which he would continue liable by the underlease; *Anon.* E. T. 1790. MSS.

SECTION IV.

Pothier Traité des Obligations, partie 2. c. 3. art. 1. s. 2. 204. (1) Puff. b. 5. c. 7. s. 6. Heineccius, J. N. & G. c. 14. s. 398.

AND it is indispensably necessary, that we have both a natural and moral power (*s*) of performing what we undertake (1). For it would be absurd, that an obligation,

(*s*) "Pacta qua contra legis constitutionesque vel contra bonos mores nullam vim habere indubitati juris est;" Cod. lib. 2. tit. 3. l. 6. This rule of the civil law is evidently drawn from the principles of universal justice; which, aiming at the prevention of wrong, prohibit agreements which would lead to or encourage wrong: but agreements to do any particular act, which is either malum in se, or malum prohibitum, are not the only agreements which the law avoids; for as the divine and positive law prohibit the doing of certain acts, so do they also enjoin the discharge of certain duties. Agreements, therefore, not to discharge such duties, are equally against the interests of society, and consequently are equally void; as are also agreements which encourage such crimes and omissions. "Instances, therefore, of conditions against law in a proper sense, are reducible under one of these heads: 1st, either to do something that is malum in se, or malum prohibitum. 2dly, To omit the doing something which is a duty. 3dly, To encourage such crimes and omissions; 1 P. Wms. 189." Upon the first head, this distinction is observable, that "though if a man be bound upon condition that he shall kill J. S. the bond be void; yet if a man make a feoffment, upon condition that the feoffee shall kill J. S. the estate is absolute, and the

which derives its power from the law, should put us under a necessity of doing somewhat which the law prohibits (*t*). Equity therefore will not decree tenant for life to commit a forfeiture (2). And so if 1000*l.* be bequeathed, to procure a dukedom to the head of the family, a bill will not lie for this (3); because it is illegal to acquire honour for money (*u*). So a bill for an

(2) *Brian* v. *Acton*, 5 Vin. Ab. 533. pl. 33.

(3) *Earl of Kingston* v. *Pierrepoint*, 1 Vern. 5.

condition void." Co. Lit. 206. b. So if a particular covenant in a bond be void, as against the common law; yet the bond is good for the covenants which are agreeable to law; for there is a difference between a bond made void by statute, and by common law; for a bond against the statute is wholly void; but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand. *Norton* v. *Simms*, Hob. 14. 2 Wils. 351.

(*t*) Or of not doing something which the law enjoins.

(*u*) And as the public are materially interested in the dispensation of honours, so are they in the grants of offices; and therefore the 5 & 6 Edw. VI. c. 16, prohibits the sale of the several public offices therein referred to, and declares all bargains and assurances respecting them to be null and void. But the provisions of this statute, not extending to all cases within the mischief which it was intended to prevent, have rendered it necessary for courts of equity, in many cases, to interpose; for though it be true, that "penal laws are not to be extended as to penalties and punish-

allowance for attendance at auctions (*x*) to enhance the price of goods, shall be dis-

ments, yet, if there be a public mischief, and a court of equity sees private contracts made to elude laws enacted for the public good, it ought to interpose." P. Lord Talbot, *Law* v. *Law*, Forrest. 140, and that upon the public policy of the law, though the office be not within the statute of Edw. VI. (*Harrington* v. *Du Chatel*, 1 Brown's Rep. 124.) which it is observable, only affects contracts between the grantor and the grantee of the office; *Bellamy* v. *Burrow*, Forrest. 108; and not persons acting as office-brokers; and therefore, to avoid such contracts, it becomes necessary for obligors to come into equity, where it is a rule, that if a man sells his interest, to procure a person an office of trust or service under the government, that it is a contract of turpitude. It is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the crown for their abilities, and with purity," per Lord Henley, *C. Morris* v. *M'Cullock*, Ambler's Rep. 435. 2 Eden's Reports, 190. But equity will not interpose if the obligation can be tried at law; *Thrale* v. *Ross*, 3 Bro. Ch. R. 57; and where it may be necessary for obligors, in a bond given for the illegal procuring of an office, to come into equity to set such security aside; yet, if an action for money had and received be brought upon the foot of an agreement, to allow the plaintiff a certain proportion of the profits of the office, in consideration of his having procured the defendant to be appointed to it, the plaintiff cannot recover; and that upon principles of public policy. *Parsons* v. *Thompson*, 1 Bla. T. Rep. 322. *Garforth* v. *Fearon*, 1 Bla. T. Rep. 327; which cases seem to have very much shaken, if

missed with costs (4); for equity will never give countenance to demands of an unfair

(4) *Weller* v. *Gascoigne*, 13 Vin. Ab. 544. pl. 13.

not over-ruled, the case of *Bellamy* v. *Burrow*, Forrester, 97. See also *Lady M. Fordyce* v. *Willis*, MSS. 8th Feb. 1791. As to assignments of officer's half-pay, see *Stone* v. *Lidderdale*, 2 Anstr. 533; and cases there cited of seamen's wages, 1 G. II. st. 2. c. 14. Of an annuity granted for the support of a dignity, *Oliver* v. *Enfonne*, Dyer, 1, 2. As to the legal effect of an assignment of the good-will of an attorney's business, See *Bunn* v. *Guy*, 4 East, Rep. As to decreeing the specific performance of such a contract, see *Bozon* v. *Farlow*, 1 Merivale, 459. As to assignment of a proctor's business, see *Crespigny* v. *Wittenoom*, 4 Term Rep. 790. As to assignment of a schoolmaster's business, see *Lewis* v. *Hutton*, 5 Term R. 639, As to assignment of a trade, see *Crutwell* v. *Lye*, 17 Ves. 335. *Harrison* v. *Gardner*, V. C. 19 July 1817. See also *Osborne* v. *Williams*, 18 Ves. 383. It would, in my opinion, be difficult to reconcile the above cases in principle; but they may be usefully consulted with a view to circumstances. As to assignment of the fees of a jailor, and the profits of a tap, see *Mithwold* v. *Welbank*, 2 Ves. 238.

(*x*) The practice of puffing, as it is called, at auctions, was, in *Bexwell* v. *Christie*, Cowp. 395, considered as illegal; but the legislature having since that case enacted, that property put up to sale at auction, shall, upon the knocking down of the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shewn to have been bought in by the owner himself, or by some person by him authorised, seems indirectly

nature. But although, where the party himself comes to be relieved against a turpis contractus, as a bond to a common harlot, the court may, perhaps, refuse to interpose; for this court should not be a court to examine such matters; yet where the plaintiff is only an executor (5), that varies the matter, (*y*). It is true, the common law will

(5) *Matthew v. Hanbury*, 2 Vern. 187.

to have given a sanction to this practice, which may materially affect the authority of the decision in *Walker* v. *Gascoigne*, and the opinion in *Bexwell* v. *Christie*. See *Morris* v. *Twining*, 2 Bro. Ch. R. 326. 28 G. III. c. 37. s. 20. *Attorney General* v. *Christie*, MSS. 4th July 1791. See *Smith* v. *Clarke*, 12 Ves. 482.

(*y*) It is a rule both of law and equity, that ex turpi contractu actio non oritur; but it is material, in the application of this rule, to consider what is to be deemed turpis contractus, and the evidence which is admissible to shew it. As to the evidence admissible to avoid the demand, on account of the turpitude of the contract, it is clear, that unless the turpitude of the contract (except in the cases hereafter mentioned) appear upon the bond or obligation, it cannot be averred; though in an action of assumpsit upon a bill of exchange by the payee, the turpitude of the consideration may be averred. As to what amounts to such a degree of turpitude as will vitiate the contract, it seems, that considerations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity. But courts of law and equity distinguish between obligations

not inquire into the consideration of a bond; for matter in pais may be avoided by aver-

for considerations past and considerations future; and therefore a bond, purporting to be in consideration of cohabitation had between the obligor and obligee, was held to be good; *Turner* v. *Vaughan*, 2 Wils. 339. *Hill* v. *Spencer*, Ambler's Rep. 641; though, as merely voluntary, equity will postpone it to other debts; *Cray* v. *Rooke*, Forrest. 153. But a bond, in consideration of the parties having agreed to live together, was held void; *Walker* v. *Perkins*, 3 Burr. Rep. 1568. *Franco* v. *Bolton*, 3 Ves. 370. Where a court of equity is required to interpose, it is not only influenced by the above distinction of the consideration being past or future, but also by the characters and situations of the parties to the contract; therefore, if a man give a bond to a common strumpet, and the bill charges such to have been the situation of the defendant, equity will relieve against it; *Whaley* v. *Norton*, 1 Vern. 483. But see *Gray* v. *Mathias*, 5 Ves. 286; and query the principle of the decision. But if the bond be given as premium pudicitiæ, equity will not set it aside; "for if a man misleads an innocent woman, it is both reason and justice he should make her reparation." *Marchioness of Annandale* v. *Harris*, 2 P. Wms. 432. *Cray* v. *Rooke*, Forrest. 153. *Cary* v. *Stafford*, Ambl. 520. But even this consideration must give way to higher claims: therefore, if the obligor was a married man, and the obligee knew him to be such, or if the obligee be a married woman; *Robinson* v. *Gee*, 1 Ves. 254; equity will not support the claim; *Priest* v. *Parrot*, 2 Ves. 160. *Lady Cox's* case, 3 P. Wms. 339. *Matthews* v. *L—e*, 1 Maddock's Rep. 558. But in this case, it seems, that equity will not relieve the obligor; *Spicer* v. *Hayward*, Pre. Ch.

ment, but not a deed (z). (And there are only two ways of pleading to a bond, viz.

114. As courts of law will not allow actions to be maintained on such contracts, if the consideration appear, it may be proper to consider, whether an action could be sustained to recover back money paid upon them? The general rule of our law is, that where one knowingly pays money, upon an illegal consideration, he is particeps criminis; and there is no reason that he should have his money again, for he parted with it freely, and volenti non fit injuria; Buller's Ni. Pri. 181, 4th ed. In *Neville* v. *Wilkinson*, 1 Bro. Ch. Rep. 547. Lord Thurlow, C. having observed, upon the cases in which it has been determined, that upon a criminal act, a person who was particeps criminis, could not be relieved in a court of justice, stated the principle of those cases to have been departed from in many other cases; as in *Anstey* v. *Reynolds*, Stra. 915. *Wilkinson* v. *Kitchen*, Ld. Raym. 89. and *Moses* v. *Macfarlane*, 2 Burr. 1005. See *Osborne* v. *Williams*, 18 Ves. 382. The civil law appears to have made several distinctions upon this point: "ubi et dantis et accipientis turpitudo versatur non posse repeti dicimus, veluti si pecunia detur ut male judicetur. Idem si ob stuprum datum sit vel si quis in adulterio deprehensus redemerit se, cessat enim repetitio si non causâ metus. Item si dederit furne proderetur, quoniam utriusque turpitudo versatur cessat repetitio. Quotiens autem solius accipientis turpitudo versatur, Celsus ait repeti posse; veluti si tibi dedero ne mihi injuriam facias. Sed quod meretrici dątur repeti non potest. Sed novâ ratione non eâ, quod utriusque turpitudo versatur sed solius dantis: illam enim turpiter facere, quod sit meretrix, non turpiter accipere, cum sit meretrix. Si tibi indicium dedero ut

to the lien as duress, &c. to shew that it never did operate; or to the condition, to shew that it is defeated by matter of as high a nature:) but Chancery will, and set it aside if illegal (*a*).

fugitivum meum indices vel furem rerum mearum non poterit repeti quod datum est: nec enim turpiter accepisti.—Quod si à fugitivo meo acceperis, ne eum indicares condicere tibi hoc quasi furi possim; sed si ipse Fur indicium à me accepit vel furis vel fugitivi socius puto condictionem locum habere." Dig. lib. 12. tit. 5. l. 3, 4.

(*z*) It seems to be now settled, that if a bond be void ab initio, the facts which make it so may be averred, and specially pleaded; *Collins* v. *Blantern*, 2 Wilson's Rep. 347.

(*a*) The interposition of courts of equity is governed by an anxious attention to the claims of equal justice; and therefore it may be laid down as an universal rule, that they will not interfere, unless the plaintiff consent to do that which the justice of the case requires to be done.

SECTION V.

So the law will not embolden the doing an illegal act: and therefore a condition against the law makes all void. But this is to be understood of the doing some act that is malum in se, then it makes the bond void; otherwise not, unless it be against a statute; for a statute is a strict law, and the letter is so (1). And where a condition, by being against law, shall avoid a bond, the condition must be against law expressly, et in terminis terminantibus, and not for matter out of the condition (2), as in bonds of resignation and the like, without an averment. Yet if the bond is general for a resignation (*b*), some special reason must be

(1) *Norton* v. *Simms*, Hob. 14. *Maleverer* v. *Redshaw*, 1 Mod. 35. 36. *Collins* v. *Blantern*, 2 Wils. 351.

(2) *Brook* v. *King*, 1 Leon. 73. 203.

(*b*) In the case of *Fytche* v. *Bishop of London*, it was determined by the court of Common Pleas, that general bonds of resignation were legal; which judgment, upon a writ of error was affirmed in the King's Bench: but upon a writ of error being brought in parliament, after a long, elaborate, and able discussion, the judgment was reversed. See Cunningham's Law of Simony, where the proceedings in the house of lords are very fully reported. It seems difficult to reconcile this decision with the cases in which the patron making an ill use of the bond, has been relied on as the only ground upon

shewn to require a resignation, or the Chancery will not suffer it to be put in suit (3): if it should not be so, simony (*c*) will be committed without proof or punishment. But, regularly (*d*), wherever there may be a way to perform the condition, without a breach of the law, it is good (4). As a condition to alien in mortmain; because there may be a licence (5).

(3) *Durston* v. *Sandys*, 1 Vern. 411. *Hawkins* v. *Turner*, Pre. Ch. 513. Finch's ed. and cases there referred to. *Peele* v. *Capel*, 1 Str. 534. *Hillyard* v. *Stapleton*, 1 Eq. Ab. 86. pl. 3. Cunningham's Law of Simony.

(4) *Mitchell* v. *Reynolds*, 1 P. Wms. 190.

(5) 2 Bla. Com. 269.

which the obligor could be relieved against it. *Durston* v. *Sandys*, 1 Vern. 411. *Peele* v. *Capel*, 1 Stra. 534. *Grey* v. *Hesketh*, Amb. 268. 3 Burn's Ec. L. 336. See also *Babington* v. *Wood*, Hut. 111. Nor is the principle of the decision generally favoured, or likely to be extended; for in *Partridge* v. *Whiston*, 4 Term Rep. 359. which was an action on a bond, to reside or to resign to the patron's son, &c. the court of B. R. observed, that as the case before them "was not precisely similar to the *Bishop of London* v. *Fytche*, they were bound by the established series of precedents to give judgment for the plaintiff."

(*c*) As to what consitutes simony, see *Baker* v. *Rogers*, Cro. Eliz. 788. *Winchcomb* v. *Bishop of Winchester*, Hob. 165. *Barrett* v. *Glubb*, 2 Bla. Rep. 1052.

(*d*) As to conditions in terrorem, see *Spillett* v. *Lloyd*, 3 P. Wms. 344. 2 Vern. 90. 1 Atk. 406. 1 P. Wms. 136. 2 P. Wms. 528.

SECTION

SECTION VI.

AND this court will not meddle with play debts, or any such things (1). However, this is not to be understood so generally as it is spoken, but to mean, that the court will give no countenance to exorbitant gaming (*c*); because such improvident hazards bring on the ruin of families. But

(1) *Taylor* v. *Bell*, 2 Vern. 170.

(*c*) At common law, the playing at cards, dice, &c. when practised innocently, and as a recreation, was not unlawful, 2 Vent. 175; nor is so held now when not within the restriction of the act. *Bulling* v. *Frost*, Espinasse's points at Nisi Prius, 235. But as the practice was found to encourage idleness and debauchery, the statute 33 H. VIII. c. 9, restrained it among the inferior sort of people. Gentlemen were, however, still left free to pursue it, until the 16 Car. II. c. 7, by which (the preamble having stated the inconveniences to be remedied by the immoderate unlawful use of gaming) it is enacted, that if any person by playing or betting, shall lose more than 100*l.* at one time, he shall not be compellable to pay his loss, and the winner shall forfeit treble the value; one moiety to the king, the other to the informer. This provision of the legislature was, however, soon found to be insufficient to its purpose; it was therefore enacted, by the 9 Anne, c. 14, for the more effectually suppressing of this pernicious vice, that all bonds, and other securities, given for money won at play, or money lent at the time to play with,

the court has seldom denied to extend its relief against the gamester himself, in behalf of the person injured; as where two

should be utterly void; that all mortgages or incumbrances of lands, made upon the same consideration, should be and enure to the use of the mortgagor; and that if any person at one time lose 10*l.* at play, he may, within three months, sue the winner, and recover it back by action of debt at law; and in case the loser does not, within the time limited, sue and prosecute, any other person may sue the winner for treble the sum so lost; and the winner is obliged and compellable to answer upon oath the bill or bills filed against him for discovering the sum or sums of money, or other thing, so won by him at play. See *Mynd* v. *Francis,* Anstr. 5. *Hudson* v. *Davis,* Anstr. 504. *Newman* v. *Franco,* Anstr. 519. Subsequent statutes have superadded further penalties to restrain this fashionable vice; "which," Sir William Blackstone observes, "may shew that our laws against gaming are not so deficient as ourselves and our magistrates in putting these laws in execution;" 4 Com. 173. These provisions of the legislature have rendered it now less frequently necessary to resort to courts of equity, which appear to have often interposed prior to the 16 Car. II. for the purpose of restraining the winner from proceeding at law against the loser, upon the security which he had obtained for the money won. See *Cromer* v. *Champney,* 14 Vin. Ab. 8. pl. 1. *Sucklyer* v. *Morley,* 14 Vin. Ab. 8. pl. 3. *Blackwel* v. *Redman,* Ch. Rep. 47. It is observable, that the statute 16 Car. II. declares, that the contract for money lost at play, and all securities given for it, shall be utterly void; but the statute 9 Anne confines itself to the *securities* for money won or lent at play. Upon which it has

men play on a joint stock, and one holds the stakes, and sweeps up the money, he shall answer a moiety of that to his companion (2). And although equity will not usually interpose in cases relating to the gaming acts, because it considers both winner and loser equally guilty, and, in taking upon them to game, they seem to renounce the benefit of the law; yet, even

(2) See *Watts* v. *Brooks*, 3 Ves. 612. But see *Knowlys* v. *Houghton*, July 1805, Ch.

been determined, that though both the security and the contract are void as to money won at play, only the security is void as to money lent at play; and that the contract remains, and the lender may maintain his action for it; *Robinson* v. *Bland*, 2 Burrow's Rep. 1077; *Barjeau* v. *Walmsley*, 2 Str. 1249. See also *Hussey* v. *Jacob*, 1 Com. Rep. 4, and the cases referred to by the editor, Mr. Rose. It is scarcely necessary to observe, the acts having declared the security void, that even a bill of exchange, given for money won at play, cannot be recovered upon by an indorsee for valuable consideration, and without notice, the original vice of the consideration affecting the security even in the hands of an innocent and bonâ fide holder; *Bowyer* v. *Bampton*, 2 Str. 1155; *Peacock* v. *Rhodes*, Doug. 614; *Lowe* v. *Waller*, Doug. 716. And it seems, that if money be paid on such security, it may be recovered back; for payment under a void security cannot be supported: nor does the limitation of three months, within which time the loser of money actually paid at the time it is lost must bring his action to recover it back, extend to payments on account of such void securities; *Rawden* v. *Shadwell*, Ambler, 269.

at law, in an action upon a wager, they have given the defendant leave to imparl from time to time (2); though, in strictness, it is not prohibited by the common law (*d*). Much more ought equity to discourage it, because the public is concerned that men should not mis-spend their estates and time. And in the civil law, they allow the loser to recover his money again, even beyond the ordinary time of prescription (*e*).

(2) *Firebrass* v. *Brett*, 2 Vern. 70. refers to this case by the name of *Sir Cecil Bishop* v. *Sir Tho. Staples*, before Lord C. J. Hale.

(*d*) In general, a wager may be considered as legal, if it be not an incitement to a breach of the peace, or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule; or if it be not against sound policy, *Da Costa* v. *Jones*, Cowp. 729. *Atherford* v. *Beard*, 2 Term Rep. 610. *Good* v. *Elliot*, 3 Term Rep. 697; where the principal cases upon this point are very fully considered.

(*e*) "Victum in aleæ lusu non posse conveniri et si solverit haberet repetitionem tam ipsum quam hæredes ejus adversus victorem et ejus hæredes idque perpetuo et etiam post triginta annos." Cod. lib. 3. tit. 43. But the civil law allowed of certain games which tended to increase strength and agility, and to promote health; and at such games, the code declares, "Liceat quidem ditioribus ad singulas commissiones seu ad singulos congressus aut vices unum assem seu numisma seu solidum deponere et ludere, ceteris autem longe minori pecuniâ." Cod. l. 3. ti. 43.

SECTION

SECTION VII.

As to the lawfulness of usury (1), since damages may be demanded for tardy payment, why may we not bargain for something certain beforehand, upon consideration that our money is in another man's power, when we were not obliged for his benefit to venture the loss, or to neglect the gain that might be made of it? And therefore, in the Roman law (2), long before Justinian's time, money might be lent at 12*l.* per cent. which was called usura centesima, but not higher, except it was lent at great hazards; for the laws there prescribed no bounds, any more than in certain conditional agreements. But in England, anciently (*f*), the persons of

(1) See Grotius de Jure Belli et Pacis, lib. 2. c. 12. s. 20. and Mr. Bentham's Vindication of Usury, Heinneccius, J. N. & G. c. 13. s. 367.

(2) Dig. lib. 22. tit. 1. passim. Cod. l. 4. t. 32. 26. 1 Domat. b. 1. tit. 6.

(*f*) It must not be understood from this expression "anciently," that an usurer could at common law be proceeded against criminally; for it appears from Glanville, that it was only in case a man died an usurer, that even his effects could be confiscated; Glanville, lib. 7, 16. 1 Reeve's Hist. Eng. Law. 119. And it is stated, in 2 Roll's Ab. 801, that the statute of Edw. III. by which the usurer was subjected to the censure of the ordinary, &c. was repealed in the same year.

usurers were punished, and the ordinary had cognizance of them in their life-time, to compel them to make restitution; and all their goods and lands escheated at their death to the king (3). And so odious was usury, in the eye of the common law (4), that a man could not maintain an action upon an usurious contract. But now such usury (g) as is allowed by the statute, hath

(3) 15 Ed. 3. c. 6.
(4) 2 Roll's Ab. 801. 35, refers to 26 Ed. 3. 71.

(g) The term usury is not here used according to its present acceptation, viz. the taking more than legal interest for the use of money; but according to the opinion which anciently prevailed, that taking any interest was against the law of God, and the welfare of the community: and, in this sense, it seems difficult to reconcile the case in Roll with the statute 20 H. III. c. 5, by which it is provided, that "from henceforth usuries shall not run against any being within age, from the time of the death of his ancestor, (whose heir he is) until his lawful age; so nevertheless, that the payment of the principal debt, with the usury that was before the death of his ancestor, whose heir he is, shall not remain." The latter provision of the act is not very distinctly worded; but Lord Coke seems to have inferred from it, that the principal and interest incurred in the life-time of the ancestor is enacted to be paid, 2 Inst. 89. And yet, in his 3d Inst. 152, he states, that by the ancient laws, usury was unlawful and punishable; from which it would follow, that, in his opinion, this act gave a right of action, which the party had not before; but from the language of the 20 H. III. c. 5, it seems clear, that an action could be maintained

obtained such strength by usage, that it will be a great impediment to traffic, &c.

before and even against the heir, otherwise the exemption of the heir had been superfluous. But whatever were the prejudices of early times against the taking of interest, they appear to have worn off in the reign of H. VIII.; a rational commerce having taught the nation, that an estate in money, as well as an estate in land, houses, and the like, might be let out to hire, without the breach of one moral or religious duty. And, indeed, when the source of this prejudice is examined, it will be found to have originated in a political, and not a moral precept; for though the Jews were prohibited from taking usury, that is, interest from their brethren, they were in express words permitted to take it from a stranger; Deut. 23, v. 20. This remark, has, however, been powerfully attacked by the learned Pothier, who insists that the taking of interest is against a moral duty, and that Moses made the above distinction merely ad Duritiam Cordis of the Jews. Tom. 2. p. 734. 4to. ed. "A capital distinction must, however, be made between a moderate and exorbitant profit, to the former of which we usually give the name of interest; to the latter the truly odious appellation of usury; the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius, "if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt by the loan, its allowance is neither repugnant to the revealed nor the natural law: but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they can never make it just;" 2 Bla. Com. 455, 459. What shall be

if it should be impeached. And although the statute is to be taken strictly, in order

a reasonable profit for the loan of money must necessarily depend on a variety of circumstances. In the reign of Henry VIII. 10*l.* per cent. was allowed, as the legal rate of interest, but by statute 5 and 6 Ed. VI. c. 20, it is observed, that the 37 H. VIII. c. 9, had been construed to give a licence and sanction to all usury not exceeding 10*l.* per cent. and this construction is declared to be utterly against Scripture; and therefore, all persons are forbid to lend or forbear by any devise, for any usury, increase, lucre, or gain whatsoever, on pain of forfeiting the thing, and the usury or interest, and of being imprisoned and fined; and so the law stood till the 13th Eliz. c. 8, which revives the 37 H. VIII. c. 9. The statute 21 Jac. I. c. 17, however, reduced the rate of interest to 8*l.* per cent. and it having been lowered in 1650, during the troubles, to 6*l.* per cent. the same reduction was re-enacted after the Restoration, by 12 Car. II. c. 13. And this rate of interest was reduced to 5*l.* per cent. by 12 Anne, st. 2. c. 16; by which statute it is enacted, "that all bonds, contracts, and assurances whatsoever, whereupon or whereby more than 5*l.* per cent. shall be directly or indirectly reserved or taken, shall be utterly void; and the person taking above 5*l.* per cent. for the forbearance of 100*l.* for a year, shall forfeit treble the value of the monies, &c. so lent, bargained, &c. These restrictions, however, do not apply to contracts made in foreign countries; for on such contracts, "our courts will direct the payment of interest according to the law of the country in which such contract was made; *Ekins* v. *East India Company*, 1 P. Wms. 396. 2 Br. P. Ca. 72. Thus Irish, American, Turkish, and Indian

to suppress usury, yet it must be between such parties as made the corrupt agreement, and not to punish others who are not privy to it (*h*). There is also a difference between a bargain and a loan. For if the principal is in hazard (5), and the bargain

(5) *Roberts* v. *Tremayne*, Cro. Jac. 507. 3 Salk. 390. Cro. Eliz. 643. 1 Atk. 350. *Matthews* v. *Lewis*, Anst. Rep. 7.

interest, have been allowed in our courts to the amount of even 12 *l.* per cent. For the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. See *Stapleton* v. *Conway*, 3 Atk. 727. Post. B. 5. c. 1. s. 6, note (*a*). And by statute 14 G. III. c. 79, all mortgages, and other securities upon estates, or other property, in Ireland, or the plantations, bearing interest not exceeding 6 *l.* per cent. shall be legal, though executed in the kingdom of Great Britain, unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case, also, to prevent usurious contracts at home, under the colour of such foreign securities, the borrower shall forfeit treble the sum so borrowed." 2 Bla. Com. 463, 464. But the statute does not extend to personal securities executed in England. *Dervar* v. *Span*, 3 T. Rep. 425.

(*h*) The statutes declaring the security given on an usurious contract to be utterly void, it necessarily followed that persons not privy to the transaction might suffer by it; though they had paid a valuable consideration for the security, as a bill of exchange, and without notice of the legal objection to its validity,

is plain, it is not within the statute of usury (*i*). but it is otherwise of a loan;

Lowe v. *Waller*, Douglas, 708. But this hardship is relieved against by 58 G. III. c. 93. *Qy.* Whether the principle of this act might not have been usefully extended to securities given for money lost at play, &c.

(*i*) In *Roberts* v. *Tremayne*, Cro. Jac. 507, these differences are stated to have been taken by Justice Dodderidge. "First, If I lend 100 *l.* to have 120 *l.* at the year's end, upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again: but if the interest and principal are both in hazard, it is then not usury. Secondly, If I secure both principal and interest, if it be at the will of the party who is to pay it, it is not usury; as if I lend to one 100 *l.* for two years, to pay for the loan thereof 30 *l.* and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party has his election, and may pay it at the first year's end, and so discharge himself." As to the first of these points, it has been determined, that if the substance of the contract be a borrowing and lending, and the contingency is so slight as to be merely an evasion, and colourable only, it is not sufficient to take it out of the statute; *Mason* v. *Abdy*, Carth. 67. *Clayton's* case, 5 Co. 70. *Richards qui tam* v. *Brown*, Cowp. 770. See also *Morse* v. *Wilson*, 4 T. Rep. 353. *Lloyd* v. *Williams*, 2 Bla. Rep. 792. 3 Wils. Rep. 254. *Gray* v. *Fowler*, 1 H. Bla. 464. Upon the second point, it may be material to observe, that though such an agreement, if bonâ fide entered into, would not be usurious, yet, if it were originally agreed that the principal money should not be paid at the time appointed, and that such clause was inserted only

for then it is intended that the principal is in no danger. However, if it be found, with an intent to evade the statute, it seems clear that the whole contract is void: for the construction of cases of this nature must be governed by the circumstances of the transaction, from which the intention of the parties in the making of the bargain will appear; which, if usurious, however disguised by a specious appearance, will avoid the bargain; 1 Hawk. P. C. 532. The legislature, aware of the many contrivances by which the most wise provisions against usury, if specified, might be defeated, has, in the statute of Anne, purposely inserted the words "directly or indirectly;" and therefore, in all questions, in whatever respect repugnant to the statute, we must get at the nature and substance of the transaction. The view of the parties must be ascertained, to satisfy the court that there is a loan, and borrowing, and that the substance was to borrow on the one part, and to lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the substance is a loan of money, nothing will protect the taking more than 5*l.* per cent.; and though the statute mentions only for loan of money, wares, merchandize, or other commodities, any other contrivance, if the substance of it be a loan, will come under the word "indirectly," per Lord Mansfield, *Floyer* v. *Edwards*, Cowp. 114; therefore if a man borrow, under colour of buying, it is usurious, ibid. 116; if it be, however, a bonâ fide sale of goods, to be paid for at the expiration of a certain time, or the seller to be allowed such an additional profit as exceeds the legal rate of interest, it is not usury. Ibid. See *Spurrier* v. *Mayoss*, 1 Ves. jun. 527. *Patterson's* case, Cro. Eliz. 104. But though such agreement be not usurious, yet, if it be a

that he took 40*l.* by a corrupt agreement, though it be not within the statute, yet

hard and unconscionable advantage, it shall not be assisted in an action for money had and received, which is an equitable action founded in conscience; *Plumbe* v. *Carter*, Cowp. 116. See also *Jeston* v. *Brooks*, Cowp. 73 In the case of *Chesterfield* v. *Janssen*, 1 Atk. 301, all the cases respecting usury are brought together, and most elaborately discussed; and the rule laid down by Lord Mansfield in the above case of *Floyer* v. *Edwards*, seems, in *Lord Chesterfield* v. *Janssen*, to have been agreed to be the true criterion of usury, or not. The most frequently practised mode of evading the statute is, by treating the transaction as for an annuity instead of a loan; for if a man purchase an annuity at ever such an under price, if the bargain was really for an annuity, it is not usury: if on the foot of borrowing or lending money, it is otherwise. P. J. Burnet, 1 Atk. 340. See *Richards* v. *Brown*, Cowp. 770. "But though there be a communication for a loan at first, if the final agreement is not to lend, but for the one to sell, and the other to purchase a real annuity, it is not usury." P. Lord Mansfield, *Richards* v. *Brown*, Cowp. 774. *Fountain* v. *Gimes*, Cro. Jac. 252. But if the annuity be made redeemable, the court looks upon the transaction as an evasion of the statute of usury, and as only a loan of money; *Floyer Sherrard*, Ambler's Rep. 19. Q. Whether this rule applies to annuities redeemable at the will of the grantor only? If there be no clause of redemption in the deed, parol evidence will not be allowed to shew that it was so agreed; *Lord Portmore* v. *Morris*, 2 Bro. Rep. 219. *Hare* v. *Shearwood*, 1 Ves. jun. 241. *Lord Irnham* v. *Child*, 1 Bro. R. 90.

judgment shall be given against him at common law (6). And, in usurious contracts, there is no doubt but equity will give relief to the borrower, in cases where the law will not reach him; for it is unjust that the lender should go away with such exorbitant gains: and the borrower can never be considered as particeps criminis (*k*), but rather as one deserving compassion

(6) 2 Roll's 801.

(*k*) The borrower was formerly considered by courts of law in the light of particeps criminis; and upon that ground, in *Tompkins* v. *Bernett*, 1 Salk. 22, it was held, that the plaintiff could not recover back what he had paid on an usurious contract: but the liberality of modern times has inclined courts of law to view the borrower in a more favourable light: and as the excess of interest might before have been recovered in equity, so may it now, in an action for money had and received; *Browning* v. *Morris*, Cowp. 792. See also *Jaques* v. *Golightly*, 2 Bl. Rep. 1073. *Astley* v. *Reynolds*, Stra. 915; but the plaintiff must, to entitle himself to relief in a civil action, shew that he has done all that equity requires. In an action, therefore, to recover goods which plaintiff had pawned, upon an usurious contract, the court held, that plaintiff must shew, that he had tendered all the money really advanced: *Fitzroy* v. *Gwillim*, 1 Term Rep. 153. It may be proper in this place, to remark, that though equity will set aside an usurious contract, upon payment of the principal actually advanced, with interest thereon, yet it will not compel the defendant to discover the usury, if complete, unless the plaintiff by his bill offer to waive the penalty;

than punishment. And though equity will not go directly contrary to an act of parliament, yet it will often apply a different remedy from what that prescribes (7).

(7) *Bosanquet* v. *Dashwood*, Forrest. 38. *Proof* v *Hines*, Forrest. 411.

Earl of Suffolk v. *Green*, 1 Atk. 450. *Chauncey* v. *Tahourden*, 2 Atk. 393. *Brand* v. *Cunning*, 22 Vin. p. 315, pl. 4.

SECTION VIII.

But there are some sorts of gaming and usury not at all prohibited by law or equity; as in case of insurances and bottomry bonds (1), which are allowed for the encouragement of trade (*l*). Insuring is,

(1) *Sharpley* v. *Hurrell*, Cro. Jac. 208. *Sayer* v. *Gleene*, 2 Lev. 54. 1 Sid. 28.

(*l*) It is certain that the hazard may be sometimes greater than the interest allowed by law will compensate; and this gives rise not only to insurance and bottomry, but also to respondentia bonds and annuities for lives. As to insurances, it may be sufficient to refer the reader to Mr. Parke's Publication, which comprehends not only the learning upon marine insurances, but also the rules and decisions which have been laid down, and which now govern insurances upon lives, or against fire, &c. The reader will likewise find the law of bottomry and respondentia very fully discussed in the same work: and, as the interference of courts of equity upon these subjects has, by the liberal decision

where a man for a certain sum takes upon him the risk that goods are to run in trans-

of courts of law, been rendered almost unnecessary, it may be sufficient for the editor of this treatise to point out, as occasion may require, the instances in which such interference is necessary to the purposes of justice. As to the practice of purchasing annuities for lives at a certain price or premium, instead of advancing the same sum as an ordinary loan, it arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed at any one period of time. He therefore stipulates to repay annually, during his life, some part of the money borrowed, together with legal interest for so much of the principal as annually remains unpaid, as an additional compensation for the extraordinary hazard run of losing that principal by the contingency of the borrower's death; all which considerations being calculated and blended together, will constitute the just proportion or quantum of the annuity granted. "The real value of that contingency," says Sir William Blackstone, "must depend on the age, constitution, situation, and conduct of the borrower; and therefore, the price of such annuities cannot, without the utmost difficulty, be reduced to any general rules; so that if by the terms o the contract, the lender's principal is bonâ fide, and not colourably put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity." 2 Bla. Com. 461. In the case of *Heathcote* v. *Paignon*, 2 Bro. Rep. Ch. 175, Lord Thurlow seems to have followed this distinction in his observation, that "if mere inadequacy is the ground of rescinding the contract for an annuity, it should seem that it was

portation from place to place (*m*). And a policy of insurance must be construed

scarcely sufficient; but there is a difference between that and evidence arising from inadequacy. If there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it would shew a command over him, which amounts to a fraud." It is scarcely possible to enumerate all the circumstances which may induce a court of equity to rescind such contracts. The cases, however, and learning upon the subject, are brought together in the case of *Heathcote* v. *Paignon,* and *Chesterfield* v. *Janssen,* and furnish at least this rule—that if there be any fraud, either direct or constructive, or the parties appear to be within the range of that policy, which gives to particular descriptions of persons an extraordinary claim to protection, courts of equity will interpose, and give relief. But if the transaction is not chargeable with fraud or imposition, and the parties to it are sui juris, and not in a situation which gives them peculiar claims to protection, courts of equity, in cases of annuities, will, as do courts of law, leave money to find its own value; no act of parliament having prescribed any regulation as to the price of annuities. See 17 Geo. III. c. 26, which prescribes the solemnities requisite to the validity of annuities.

(*m*) Our author's definition is evidently confined to marine insurance. Sir William Blackstone defines a policy of insurance to be a " contract between A. and B., that upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event;" 2 Bla. Com. 458. This definition

according to the usage amongst merchants, and the voyage ought to be according to the usage. And the King's Bench takes notice of the laws of merchants, which are general, though not of particular usages (2); for the law merchant is an universal law throughout all the world. But insurances are for the benefit of traders and merchants only; and for this end were they at first introduced, that a merchant having a loss might not be undone, many bearing the burthen together: not that others unconcerned in trade, nor interested in the ship, should profit by it (3). And the reason why a man having some interest (*n*) in the ship

(2) *Lethulier's* case, 1 Salk. 443. 1 Ld. Raym. 281.

(3) *Goddart* v. *Garrett*, 2 Vern. 269. *Whittingham* v. *Thornborough*, Pre. Ch. 20.

agrees with the "versio periculi of the civilians, in contradistinction to the spei emptio et venditio, which they defined to be a wager."

(*n*) The practice which formerly prevailed of insuring large sums without having any property on board, which were called insurances, interest, or no interest, and also of insuring the same goods several times over, both of which were a species of gaming without any advantage to commerce, induced the legislature, by the 19 G. II. c. 37, to enact, that all insurances, interest, or no interest, or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the assurer (all which had the same pernicious tendency), should be totally null and void, except upon privateers or ships upon the

or cargo, may insure five times as much, is, because a merchant cannot tell how much or how little, his factor may have in readiness to lade on board his ship (4).

(4) *Goddart* v. *Garrett*, 2 Vern. 419.

Spanish or Portuguese trade; and that no re-assurance should be lawful, except the former insurer should be insolvent, a bankrupt, or dead. It appears from the cases of *Goddart* v. *Garrett*, 2 Vern. 269; and *Le Pypre* v. *Farr*, 2 Vern. 716, that the court of Chancery had manifested its inclination to suppress wagering policies, and policies without the benefit of salvage, before the legislature interposed; and it is said that courts of law had intimated an opinion that policies, interest, or no interest, were formerly bad. See Parke's Insurance, p. 296. It is now determined, that a valued policy is not to be considered as a wager policy, or like a policy, interest, or no interest; *Lewis* v. *Rucker*, 2 Burr. 1167. And, therefore, upon valued policies, the merchant need only prove some interest, because the adverse party has admitted the value; and if more were required, the agreed valuation would signify nothing: but if it should come out in proof that a man had insured 2,000*l.* and had interest on board to the value of a cable only, it never has been determined, that by such an evasion the act of parliament may be defeated. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy the prime cost must be proved; in a valued policy it is agreed; and for these reasons a bonâ fide valued policy was held by Lord Mansfield not to be within the 19 Geo. II. *Lewis* v. *Rucker*, 2 Burr. 1167. See Parke's Insurance, c. 14, where the cases upon this point are collected, and referred to their respective principles. As to equitable interests in ships with reference to the registry acts, see *Ex parte Yallop*, 15 Ves. 67. *Ex parte Houghton*, 17 Ves. 253.

SECTION IX.

BOTTOMRY, or fœnus nauticum, is so called from the bottom of the ship, a part being put for the whole; for it is indeed in the nature of a mortgage of the ship: and this is allowed almost every where, by reason of the hazard of the lender (*o*), and

(*o*) "The distinction (says Molloy de Jure Maritimo, b. 2. c. 11. s. 8,) is great, between monies lent to be used in commerce at land, and that which is ventured at sea. In the first, the laws of the realm have set marks to govern the same, whereby the avaricious mind is limited to a reasonable profit. The reason of that is, because the lender runs none, but the borrower all the hazard whatever that money brings forth; but money lent to sea, or that which is called pecunia trajectitia, there the same is advanced on the hazard of the lender, to carry, as is supposed, over sea; so that if the ship perishes, or a spoliation of all happens, the lender shares in the loss, without any hopes of ever receiving his monies; and therefore is called sometimes usura marina, as well as fœnus nauticum; the advantage accruing to the owners from their money arising not from the loan, but from the hazard which the lender runs." There is another species of loan, called respondentia, which differs from bottomry principally in this, that it is not upon the vessel, but upon the goods and merchandise which must necessarily be sold or exchanged in the course of the voyage; in which contract

it being found useful for navigation and commerce (1). Yet a court of equity (*p*)

(1) Molloy de Jure Mar. 361. 2 Bl. Com. 457. Parke's Marine Insurance, 468. *Sharpley* v. *Hurrell*, Cro. Jac. 208. *Roberts* v. *Tremayne*, Cro. Jac. 508. *Joy* v. *Kent*, Hard. 418. *Sayer* v. *Green*, 1 Lev. 54. 1 Sid. 27. *Chesterfield* v. *Janssen*, 2 Ves. 148, 154.

the borrower is personally bound, provided the goods are safe, though the ship perish; whereas, in bottomry, the ship and tackle, as well as the person of the borrower, are liable, though the goods should be lost. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself. When a man lends a merchant 1,000 *l.* to be employed in a beneficial trade, with condition to be paid with extraordinary interest, in case such a voyage should be safely performed; which kind of agreement is sometimes called fœnus nauticum, and sometimes usura maritima. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the 19th G. II. c. 37, that "all monies lent on bottomry, or at respondentia, on vessels bound to or from the East Indies, shall be expressly lent only upon the ships, or upon the merchandise, that the lenders shall have the benefit of salvage; and that if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender for as much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandise be totally lost;" 2 Bla. Com. 458. "This statute has entirely put an end to that species of contract which was last mentioned; namely, a loan upon the mere voyage itself, as far at least as relates to India voyages; but as none other are mentioned, and as expressio unius est exclusio alterius,

will never assist a bottomry-bond, which carries an unreasonable interest (2); but will leave him to recover at law as well as he can. On the other side, if the obligor

(2) *Dandy* v. *Turner*, 1 Eq. Ca. Ab. 372. pl. 7.

these loans may be made in all other cases as at common law; Parke's Ins. p. 470. But as the allowance of an extraordinary interest is in respect of the risk, it follows, that in all these species of contracts, if the risk is not run, the lender cannot be entitled to the extraordinary premium; for that would be to open a door to means by which the statute of usury might be evaded. See *Deguilder* v. *Depeister*, 1 Vern. 263.

(*p*) Mr. Parke observes, "that the case referred to conveys a very unmerited censure upon bottomry-bonds, not at all warranted by the long chain of uniform decisions in their favour. Indeed, from the very nature of the contract, they are to carry the naval interest, which is always greater than land interest, in proportion as the risks run by the lender on bottomry are much greater than those which a lender upon a common bond incurs." Parke's Ins. 478. Though it be true, that the rate of interest allowable on such risk is greater than the ordinary rate of interest, it by no means follows, that even the rate of interest agreed on may not be unreasonable with reference to the risk; and if it be unreasonable, though the transaction be legal, equity cannot, consistently with the principles which govern its interference, assist a claim founded upon it. It might as reasonably be objected to courts of law, that having determined an agreement not to be usurious, they are bound to give compensation for its non-performance; but it seems to be now settled

goes the voyage, he shall not be relieved here, upon pretence that the deviation was of necessity, saving as to the penalty (3). And if the ship, though lost, has deviated from the voyage mentioned in the bond, the obligee may recover the money on the policy of insurance, and also put the bottomry-bond in suit; for the insurers might as well pretend to have aid of the bottomry-bond, as the obligor of the money recovered on the policy (4).

(3) *Western* v. *Wildy*, Skin. 59, 152. *Williams* v. *Steadman*, Holt's R. 126. *Anon.* 1 Eq. Ca. Ab. 372. pl. 5. 2 Ch. Ca. 130.

(4) *Harman* v. *Vanhatten*, 2 Vern. 717.

that if compensation for the non-performance of a contract, not strictly illegal, but harsh and unreasonable, be sought in an equitable action, that the plaintiff shall not recover; *Plumbe* v. *Carter*, Cowp. 116, in a note to *Floyer* v. *Edwards*, *Jeston* v. *Brooks*, Cowp. 793.

SECTION X.

It was also a rule in the civil law (1), that marriage ought to be free; and the same policy has obtained in equity (*q*). And,

(1) Dig. lib. 35. tit. 1. l. 62, 63, 64. See L. C. Rosslyn's Judgment in *Stackpole* v. *Beaumont*, 3 Ves. 89.

(*q*) The civil law, as a system of jurisprudence framed by wise men, and approved by the experience of many ages, must, in every country, and in every age, furnish principles, which modified and applied, as the altered circumstances of the times may require, will greatly contribute to the real interests and welfare of society:

therefore, in case of a bond in common form for payment of money, but proved

but if the same system be drawn out to its full extent and applied without any regard to the change which may have taken place in the opinions and manners of mankind, it must, notwithstanding its general wisdom and utility, prove in many particulars defective, and insufficient to the purposes, which, in its original application, it was most admirably calculated to accomplish. The institution of marriage, whether it be considered as a religious institution, or, according to the opinions of some, as a merely positive and social institution, will still be found to involve consequences more extensively and more seriously interesting to society than any other institution whatsoever. See Spirit of Laws, b. 23, c. 2. To secure to society all the advantages which such an institution is calculated to produce and confer, it seems to be peculiarly important that the law should secure to individuals that freedom of choice which is necessary to reconcile the happiness of individuals with the welfare of the state, and with a view to so desirable an object, the civil law appear to have marked a disposition particularly anxious to remove every obstacle which might deter individuals from entering into a state so favourable to the interests of the public. See Digest, lib. 35. tit. 1. s. 62, 63, 64. But it is observable, that whilst the consideration of the public welfare was allowed to operate so far as was consistent with the freedom of individuals in general, it was not allowed to break in upon those domestic claims which stood in need of the protection of the state; and therefore, though conditions in restraint of marriage were held generally void, and even a condition si à liberis ne nupserit was not allowed to prevail, yet a condition si

that the agreement was, that the obligor should marry such a man, or should pay

à liberis ne nupserit was not allowed to prevail, yet a condition si à liberis *impuberibus* ne nupserit, would be good; Digest, lib. 35, tit. 1, c. 62. s. 2. And the reason of this distinction is assigned, "quia magis cura liberorum quam viduitas injungeretur." A reason, which our law has known how to extend; and which, by receiving its true direction, and fair and rational operation, has led to many distinctions in our system, which seem to have escaped the vigilant policy of the civil law. *Marples* v. *Bainbridge*, 1 Madox's Rep. 590. It may be laid down as a fundamental proposition, that marriage ought to be free; by which is intended, that as the parties contracting are principally interested in the contract, they ought to possess all those faculties which are requisite to the validity of every other species of contract, which Puffendorff defines to be, 1st, A physical power; 2dly, A moral power of consenting; 3dly, A serious and free use of them; the rather, as the contract of marriage is connected with more important consequences than any other species of contract, insomuch as it is less easily dissolved; and though dissolved, if there be children, many of its consequent ties remain. But though it be true, that freedom from restraint, as it encourages this species of contract, is of importance to the state, it must not be considered as a principle to be pursued to its whole extent, and at every hazard; for if it were, it would be found, that this principle, the well-regulated and bounded influence of which is capable of inducing real benefit to society, is, in its excess or abuse, like other good principles, destructive of the very interests which it professes to consult. The claims of parental authority, controlled as they are by the law

the money due on the bond: the court will decree this bond to be delivered up to be

of England, merit considerable respect: nor has the right which individuals have of qualifying their bounty been disregarded. The only restrictions which the law of England imposes, are such as are dictated by the soundest policy, and approved by the purest morality: that a parent professing to be affectionate shall not be unjust; that professing to assert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generosity, shall not be allowed to operate as a temptation to do that which militates against nature, morality, or sound policy, or to refrain from doing that which would serve and promote the essential interests of society; are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercise. See Puff. Law of Nature and Nations, b. 6. c. 2. s. 14. On these considerations are founded those distinctions which have, from time to time, been recognized in our courts of equity, respecting testamentary conditions, with reference to marriage. The cases upon the subject are very many, and not immediately reconcileable: to bring them together, and to point out their respective distinctions, is all the editor of this treatise professes to do. To draw out the principles upon which they proceeded to their whole extent, and to illustrate them by a view of the policy which informs them, is an undertaking, though well deserving attention, of too great magnitude to fall within the range of this work.

In deciding upon the validity of any condition of

cancelled, as being contrary to the nature and design of marriage, which ought to

marriage, it is necessary to advert to the nature of the estate charged with the gift, to which such condition is annexed. 1. If the estate charged be real estate; then it is material to determine whether such condition be precedent or subsequent. 2. If the estate charged be personal; the force or validity of the condition will depend on its reasonableness; as also on the gift being given over, or not given over.—1. Where the gift or devise, to which a condition of marriage is annexed, is of land, or a charge on land, it seems settled, that if such condition of marriage be precedent, it must be strictly performed, in order to entitle the party claiming, to the benefit of such gift; *Bertie* v. *Lord Falkland*, 3 Ch. Ca. 130. 2 Vern. 338, 339. 2 Freem. 220. *Fry* v. *Porter*, 1 Mod. 300. *Reeves* v. *Hearne*, M. 4. G. 2. 5 Vin. Ab. 343. *Harvey* v. *Aston*, 1 Atk. 361. *Pullen* v. *Ready*, 1 Wils. 21. *Reynish* v. *Martin*, 3 Atk. 330. 1 Wils. 130. *Randal* v. *Payne*, 1 Bro. C. R. 55. *Burleton* v. *Humfrey*, Ambl. 256. *Dashwood* v. *L. Bulkeley*, 10 Ves. 230. *Lester* v. *Garland*, 15 Ves. 248. For interests arising out of land, shall be governed by the rules of the common law, Co. Litt. 206. a. b. 217. a. *Popham* v. *Bamfield*, 1 Vern. 83. *Chauncey* v. *Graydon*, 2 Atk. 616. If the condition be subsequent, its validity will depend on its being such as the law will allow to divest an estate. See Co. Litt. 206. b.—2. If the gift or legacy, to which a condition of marriage be annexed, be charged on personal estate, such condition, except under the circumstance after mentioned, shall, according to the rule of the civil law, be considered as merely in terrorem; but if the gift or legacy be given over,

proceed from free choice, and not from any compulsion (2). So wherever a mother or

(2) *Key* v. *Bradshaw*, 2 Vern. 102. See also *Drury* v. *Hooke*, 1 Vern. 412.

in the event of the condition being broken, then the condition shall be allowed to prevail: see *Pigot*'s case cited by Winch J. in *Griesley* v. *Lother*, Moore's Rep. 857. *Norwood* v. *Norwood*, 1 Ch. R. 65. *Bellasis* v. *Cromin*, 1 Ch. Ca. 22. *Sutton* v. *Jewks*, 2 Ch. Rep. 50. *Jervois* v. *Duke*, 1 Vern. 19. *Rightson* v. *Overton*, 2 Freem. 21. *Anon.* 1 Freem. 302. *Davis* v. *Hatton*, cited 2 Freem. 10. *Hicks* v. *Pendarvis*, 2 Freem. 41. *Garrett* v. *Pritty*, 2 Vern. 293. *Semphill* v. *Bayley*, Pre. Ch. 562. *Stratton* v. *Grymes*, 2 Vern. 357. *Pigolt* v. *Morris*, Sel. Ca. Ch. 26. *Pulling* v. *Ready*, 1 Wils. 21. *Reynish* v. *Martin*, 1 Wils. 130. 3 Atk. 330. *Wheeler* v. *Bingham*, 3 Atk. 364. *Harvey* v. *Aston*, Forrest. 212. *Graydon* v. *Hicks*, 2 Atk. 16. *Chauncey* v. *Tahourdin*, 2 Atk. 392. *Chancey* v. *Fenhoulet*, 2 Ves. 265. *Long* v. *Dennis*, 4 Burr. 2052. *Hemmings* v. *Minchley*, 1 Bro. Ch. Rep. 303. *Scott* v. *Tyler*, 2 Bro. Ch. Rep. 431. With respect to what shall amount to a bequest over, and, in particular, whether a bequest or devise of the residue is sufficient to support the condition, see *Paget* v. *Heywood*, cited 1 Atk. 378. Rolls. Nov. 1733. *Wheeler* v. *Bingham*, 3 Atk. 364. *Garratt* v. *Pritty*, 2 Vern. 293. *Semphill* v. *Bailey*, Pre. Ch. 562. and *Lady Kilmury*'s case, cited in *Parker* v. *Parker*, 2 Freem. 59. *Amos* v. *Horner*, 1 Eq. Ca. Ab. 112. *Scott* v. *Tyler*, 2 Bro. C. R. 463. *Jones* v. *E. of Suffolk*, 1 Bro. Ch. R. 529.

It must not be inferred, from the frequent instances of conditions in restraint of marriage being declared

father, or guardian, insist upon a private gain, or security for it, and obtains it of the

void, that all conditions annexed to personal gifts, which in any manner affect marriage, are void, unless given over; for the same principles of policy, which annul such conditions when they attend to a general restraint of marriage, will favour and support them when they merely prescribe such provident regulations and sanctions as tend to protect the individual from those consequences to which an over hasty, rash, or precipitate match would probably lead: "therefore, if the conditions are only such, whereby a marriage is not altogether prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are not utterly rejected;" Godolp. Orp. Leg. Part 1. c. 15. s. 1. "An injunction to ask consent is lawful, as not restraining marriage generally; a condition, that a widow shall not marry, is not unlawful; an annuity during widowhood; a condition, to marry or not to marry Titius, is good; a condition, prescribing due ceremonies and place of marriage, is good; still more is a condition good, which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively to restrain marriage generally;" P. Lord Thurlow, *C. Scott* v. *Tyler*, 2 Bro. C. Rep. 488.

Courts of equity having allowed conditions of marriage, under certain circumstances, to prevail, have, however, constantly marked an anxious inclination to guard against that abuse, to which the giving one person any degree of control over another might eventually lead. In *Daley* v. *Desbouverie*, 2 Atk. 261, Lord Hardwicke, C. observes, that "persons, whose consent

intended husband, it shall be set aside (3); for the power of a parent or guardian ought not to be made use of to such purposes.

(3) *Lamlee* v. *Hanman*, 2 Vern. 499. *D. of Hamilton* v. *Mohun*, 2 Vern. 652. 1 P.Wms. 118. 1 Salk. 158. *Kent* v. *Allen*, 2 Vern. 588. Pre. Ch. 267. *Tooke* v. *Atkins*, 1 Vern. 451. 475. *Kemp* v. *Coleman*, 1 Salk. 156. *Cole* v. *Gibson*, 1 Ves. 503. *Hylton* v. *Hylton*, 2 Ves. 547. *Pierce* v. *Waring*, 13th Nov. 1745. Ch. 1 Vern. 475. 2 Vern. 445. 392.

is required to a marriage, ought to consider themselves in the light of a parent, and readily consent, where there is no serious objection to the marriage." In *Harvey* v. *Aston*, Mr. Justice Comyns states, that "where the condition has been performed to a reasonable intent, the court has dispensed with the want of circumstances; as where the major part of the trustees consent, or where the trustees give an implied, not an express consent;" *Daley* v. *Clanrickarde*, 10th Dec. 1738, Ch. *Burleton* v. *Humfrey*, Ambl. 256, Ch. cited in *Long* v. *Dennis*, 4 Burr. 2056. So where the father has made the marriage himself; 1 Atk. 375. *Mesgrett* v. *Mesgrett*, 2 Vern. 580. *Clerk* v. *Berkley*, 2 Vern. 721. *Campbell* v. *Netterville*, 2 Ves. 534. *L'Strange* v. *Smith*, Ambl. 263. *Crommelin* v. *Crommelin*, 3 Ves. 227. *D'Aguilar* v. *Duckwater*, 2 Ves. & B. 225. *Dashwood* v. *Lord Bulkeley*, 10 Ves. 230. *Clarke* v. *Parker*, 19 Ves. 1. *Goldsmid* v. *Goldsmid*, Coop. Ch. R. 225. *Pollock* v. *Croft*, 1 Merivale, 184. *Merry* v. *Ryves*, 1 Eden's Rep. 1. Where the condition is become impossible, by the person dying whose consent is necessary before the marriage, it is an excuse; *Graydon* v. *Hicks*, 2 Atk. 16. See also *Peyton* v. *Bury*, 2 P. Wms. 626; nor will a court of equity require the consent beyond the minority of the legatee, *Knapp* v. *Noyes*, *Amb.* 662. Gilbert's Hist. Ch. Lex Prætoria, 337. But see *Dobbins* v. *Bland*, Sel. Ca. in Ch. p. 1. Not only conditions imposed by others,

You shall not have my daughter, unless you do so and so, is to sell children and matches (*r*). And these contracts with the father, &c. seem to be of the same nature with brokage-bonds, &c. but of more mischievous consequence, as that which would happen more frequently; and it is now a settled rule, that if the father, on the marriage of his son, takes a bond of the son to pay him so much, &c. it is void, being done by coer-

in restraint of marriage, are generally void; but also obligations by the parties themselves are void, if they be restrictive of marriage in general; *Baker* v. *White*, 2 Vern. 215. *Woodhouse* v. *Shipley*, 2 Atk. 535. *Lowe* v. *Peers*, 4 Burr. 2225.

(*r*) From the case of *Grisley* v. *Lother*, Hob. 10, it should seem, that though the procuring of a marriage is not a consideration in equity, it is a sufficient consideration in law; and of that opinion Holt, C. J. appears to have been in *Hall* v. *Potter*, 3 Lev. 411; and the circumstances of the bond, in that case, having been ultimately cancelled by the decree of the House of Lords, does not affect the rule of law, as that decision was upon an appeal from the decree in equity, which had held the bond to be good—Show. P. C. 76, That courts of equity do not, in such cases, interpose for the particular damage to the party, but from considerations of public policy, marriage greatly concerning the public; see *Law* v. *Law*, Forrest. 142. *Drury* v. *Hooke*, 1 Vern. 412. Q. Whether the vice of such consideration could not now be pleaded at law? *Collins* v. *Blantern*, 2 Wils. 347.

cion, while he is under the awe of his father. Nor will the court only decree a marriage brokage-bond to be delivered up, but a gratuity of fifty guineas actually paid to be refunded (4); for such bond is in no case to be countenanced. And a bond to procure marriage, though between persons of equal rank and fortune, is void, as being of dangerous consequence (*s*). So if A. being a widow, gives a bond to B. of 20*l.* if she should marry again, and B. gives a bond to the widow to pay her executors the like sum if she did not marry again (5), and the widow soon after marries, her bond will be decreed to be delivered up (*t*). And the difference which some take, where it is a bond penal, whereon the jury can give no

(4) *Goldsmith* v. *Browning*, 2 Vern. 392.

(5) *Baker* v. *White*, 2 Vern. 215. *Woodhouse* v. *Shipley*, 2 Atk. 595. *Lowe* v. *Peers*, 4 Burr. 2225.

(*s*) That equity will relieve against bonds to strangers for the procuring of marriage, see *Arundel* v. *Trevilien*, 1 Ch. Rep. 47. *Glanville* v. *Jennings*, 3 Ch. Rep. 18. Toth. 27. *Drury* v. *Hook*, 2 Ch. Ca. 176. 1 Vern. 412. *Cole* v. *Gibson*, 1 Ves. 503. *Smith* v *Aykwell*, 3 Atk. 566. And as these contracts are avoided, on reasons of public inconvenience, the court of Exchequer, in *Shirely* v. *Martin*, 14th Nov. 1779, held, that they would not admit of subsequent confirmation by the party.

(*t*) Q. If such bond is not relievable at law? *Lowe* v. *Peers*, 4 Burr. 2225.

less than the penalty, and the case (of a promise) where the jury will, as cause is, lessen, &c. seems not to be law; but the agreement void in both cases. And so in restraints of trade, the distinction is not between bonds and promises, as is laid down in some books; but it is between bonds, covenants, or promises with consideration, and such as are without (6): for the first, if only with respect to a particular place or person, may be just and reasonable; nor is it against Magna Charta; for that only provides against power and force, that a man be not disseised of his liberty or estate, but he may sell either. Whereas the other, for aught appears, may be oppressive, and is of mischievous consequence to the public (*u*).

(6) *Mitchell* v. *Reynolds*, 1 P. Wms. 181.

(*u*) This subject is most elaborately discussed in the judgment given by C. J. Parker, in *Mitchell* v. *Reynolds*, 1 P. Wms. 181, and the notes furnished by Mr. Cox refer, with the usual accuracy of his edition, to the modern cases. See also *Davis* v. *Mason*, 5 Term. Rep. 118. *Chesman* v. *Naisby*, 3 Bro. C. R. 349. *Shackle* v. *Baker*, 14 Ves. 468. *Crutwell* v. *Lye*, 17 Ves. 335. *Cooke* v. *Chayworth*, 18 Ves. 12. *Harrison* v. *Gardner*, 2 Maddock's Rep. 198.

SECTION XI.

AND in the civil law, counter-letters, and all secrets acts which make any change in agreements, are of no manner of effect, with respect to the interest of a third person (1); for this would be an infidelity contrary to good manners and the public interest (*x*).

(1) *Payton* v. *Bladwell*, 1 Vern. 240. *Redman* v. *Redman*, 1 Vern. 348. *Gale* v. *Lindo*, 1 Vern. 475. *Lamlee* v. *Haman*, 2 Vern. 466. *Middleton* v. *Onslow*, 1 P. Wms. 768. *Pitcairne* v. *Ogbourne*, 2 Ves. 375. *Montefiori* v. *Montefiori*, 1 Bla. Rep. 363.

(*x*) In cases of this nature, it is not necessary that the fraud respect an article *expressly contracted for*; but any representation, misleading the parties contracting, on this subject of the contract, is within the principle which governs this class of cases; see *Neville* v. *Wilkinson*, 1 Bro. Rep. 543, and stated in Mr. Cox's note to *Roberts* v. *Roberts*, 3 P. Wms. 74, in which case, "Lord Thurlow, C. relieved by injunction against a bond entered into by the plaintiff to the defendant, before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's desire, upon the occasion of such treaty, misrepresented to the wife's father, the amount of the plaintiff's debts, and particularly concealed from him the bond in question: and this relief was given, although it did not appear that there was any actual stipulation, on the part of the wife's father, in respect of the amount of the plaintiff's debts." See *Dalbiac* v. *Dalbiac*, 16 Ves. 125. *Thompson* v. *Harrison*,

So private agreements, in derogation of marriage-articles are all set aside in equity

1 Cox's Rep. 344. *Scott* v. *Scott*, 1 Cox's Rep. 366. *Martin* v. *Bennett*, Bunb. 336. The principle of this rule, though it has been most frequently applied to agreements contra fidem tabularum nuptialium, extends to every other species of agreements: therefore, if A. agree to give B. a certain sum for goods in advancement of C. any secret agreement between B. and C. that the latter shall pay a further sum, is void; *Jackson* v. *Duchaire*, 3 Term. Rep. 551. *Masters* v. *Fuller*, 4 Bro. Rep. 19. *Daubeny* v. *Cockburn*, 1 Merivale, 626. *Vauxhall Company* v. *Lord Spencer*, Maddock's R. 365. So where a tradesman compounding his debts, privately agreed with some of his creditors to pay them the whole of their debts, by which they were induced to appear to accept of the composition; such private agreement was held to be a fraud on the other creditors; *Child* v. *Danbridge*, 2 Vern. 71. *Small* v. *Brackley*, 2 Vern. 602. *Spurrett* v. *Spiller*, 1 Atk. 105. *Cecil* v. *Plaistow*, Anstr. Rep. 202. *Jackson* v. *Lomas*, 4 T. Rep. 166. *Mawson* v. *Stock*, 6 Ves. 300. *Ex parte Sadler*, 15 Ves. 52. *Constantein* v. *Blache*, 1 Cox's R. 287. And it seems that such fraud is now relievable at law; *Cockshott* v. *Bennett*, 2 Term Rep. 763. The case of *Lewis* v. *Chase*, 1 P. Wms. 620, is however irreconcileable with this principle; it may therefore be material to observe, that it is very much shaken, if not over-ruled by several subsequent cases, particularly *Smith* v. *Bromley*, Dougl. 670. But though private agreements in fraud of third persons be void, yet if a bond or note be given by A. the more effectually to enable B. to bring about a match, &c. such bond or note may be recovered upon at law; *Montefiori* v. *Montefiori*, 1 Bla. Rep. 363. So if a third

(2) *Morrison* v. *Arbuthnot*, 5 Vin. Ab. 534. pl. 10. *Sir P. Butler* v. *Sir H. Chauncy*, cited 1 Eq. Ca. Ab. 88, 89, in *Gifford* v. *Gifford*, which states a distinction.

(3) *Collins* v. *Willis and wife*, Cro. Eliz. 774.

(2). As where the daughter promised to repay 10*l.* part of the marriage-portion of 90*l.* this is a fraudulent and void promise (3). So where A. having a kindness for B. treated a marriage for him with C. for his niece, and a settlement being agreed upon for 2,500*l.* portion, he obtained a redemise of part of the estate settled for present maintenance, and a release of what A. had covenanted to settle after his death; and both set aside in equity (4). So where the brother gave a bond to make up his sister's portion the sum that was insisted on, but took a bond from her before marriage to repay. The husband died, the wife survived, and was relieved against the the bond (5). From which cases it may be collected, that what is the open and public treaty and agreement upon marriage shall not be lessened, or any ways infringed, by any private treaty or agreement (6). And that which was once a fraud, will always

(4) *Stribblebill* v. *Brett*, 2 Vern. 445. Pre. Ch. 165.

(5) *Gale* v. *Lindo*, 1 Vern. 475. *Redman* v. *Redman*, 1 Vern. 348.

(6) *Lamlee* v. *Hanman*, 2 Vern. 500.

person give his bond, or security, to procure the certificate of a bankrupt; *Key* v. *Bolton*, 6 Term. Rep. 134. See also *Feise* v. *Randall*, 6 Term Rep. 146. But see *Fawcett* v. *Gee*, Exch. E. T. 1797; and a conveyance of land for such purpose, notwithstanding a defeasance, will be sustained in equity. *Webber* v. *Farmer*, 13 Vin. Ab. 525. 2 Bro. P. C. 88.

be so (*y*); and the woman surviving the husband, will not better the case, nor the assignment of such a bond to creditors; for a bond, assignable only in equity, is still liable to the same equity as if remaining with the obligee (7); and as to any promise made afterwards to pay it, that was but nudum pactum, and not binding (8). So a settlement made by a woman before her marriage, for her separate use, without the husband's privity, shall not bind the husband (9), being in derogation of the rights of marriage. But where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees for children by her former husband (*z*); it is certain a widow might, with a

(7) *Coles* v. *Jones*, 2 Vern. 692. *Weyman* v. *Weyman*, 5 March, 1739. Bellow's MSS. 305. *Turton* v. *Benson*, 2 Vern. 764. Stra. 240. 1 P. Wms. 496. Pre. Ch. 522. 10 Mod. 445. *Cator* v. *Burke*, 1 Bro. Rep. 434.

(8) *Gale* v. *Lindo*, 1 Vern. 475.

(9) *Howard* v. *Hooker*, 2 Ch. Rep. 42. Gilbert's Lex Prætoria, 267. *Poulson* v. *Wellington*, 2 P. Wms. 535. But see *Countess of Strathmore* v. *Bowes*, 2 Bro. Rep. 345. See c. 2. s. 6. note (*o*). p. 107.

(*y*) Quod ab initio non valet tractu temporis non convalescet, is the rule of law, and governs the distinctions upon the subject of confirmation in equity. See ch. 2. s. 13, note (*r*). See also *Cockshott* v. *Bennett*, 2 Term Rep. 763. But this rule does not extend to subsequent bonâ fide purchasers.

(*z*) It seems agreed, that if a woman on the point of marriage charge or convey her property to a mere stranger, for whom she was not under even a moral

good conscience, before she put herself under the power of a second husband, provide for the children she had by the first (10).

(10) *Hunt* v. *Matthews*, 1 Vern. 408. *King* v. *Cotton*, 2 P. Wms. 358. 674. *Newstead* v. *Scarle*, 1 Atk. 265. *Doe* v. *Routledge*, Cowp. 705. *Ex parte Marsh*, 1 Atk. 158.

obligation to provide, that such conveyance will be decreed fraud on the marital rights; *Lance* v. *Newman*, 2 Ch. Rep. 41. *Blanchett* v. *Foster*, 2 Ves. 264. see c. 2. s. 6. n. (*o*).

SECTION XII.

And, by the civil law, whatever debtors do to defeat their creditors is void (1); and there is a great resemblance between the civil law in this matter and the statute of 13 El. (*a*). But in each of them there was

(1) Dig. lib. 42. ti. 8. l. 6. s. 8. Domat's Civil Law, B. 2. ti. 10. s. 1, 2.

(*a*) The 13 Eliz. c. 5, not only declares all deeds made in fraud of creditors to be null aud void, but subjects the parties to such fraud to certain penalties and forfeitures; from which circumstance it should seem that the provisions of this act ought to be construed strictly. Lord Mansfield, however, in *Cadogan* v. *Kennett*, Cowp. 434, observes, that "the statutes '13 Eliz. c. 5; 27 Eliz. c. 4, cannot receive too liberal a construction, or be too much extended in suppression of fraud." 3 Rep. 82. 2 Atk. 205. That copyholds, if not by custom subject to debts are not within the statute. See

this exception, that it should not extend to avoid any estate or interest, &c. made upon

Matthews v. *Feaver*, 1 Cox's Rep. 278. But see Cowp. 705.

The object of the legislature was evidently to protect creditors from those frauds which are frequently practised by debtors, under the pretence of discharging a moral obligation; for as to those gifts or conveyances which want even a good or meritorious consideration for their support, their being voluntary seems to have been always a sufficient ground to conclude that they were fraudulent; but though the statute protects the legal right of creditors against the fraud of their debtors, it anxiously excepts from such imputation the bonâ fide discharge of a moral duty. It therefore does not declare all *voluntary* conveyances, but all *fraudulent* conveyances to be void; 1 Ch. Ca. 99, 291. 1 Vent. 194. 1 Mod. 119. 1 Atk. 15. Cowp. 708; and whether the conveyance be fraudulent or not, is declared to depend on the consideration being good and bonâ fide. This leads to the inquiry what shall be deemed a good consideration, and what is intended by requiring a conveyance for such consideration to be also bonâ fide. A good consideration is that of blood, or of natural love and affection; 2 Bla. Com. 297: and a gift made for such consideration ought certainly to prevail, unless it be found to break in upon the legal rights of others; but if it does break in upon such rights, it is equally clear that it ought to be set aside: if, therefore, a man being indebted convey to the use of his wife or children, such conveyance would be within the statute; for though the consideration be good, yet it is not bonâ fide; that is, the circumstances of the grantor render it

(2) 13 Eliz. c. 5. s. 6. *Twine's* case, 3 Rep. 81. a. Sheppard's Touchstone, p. 65. 2 Com. Dig. Covin.

a good consideration and bonâ fide (2). And therefore if a man steals a young lady,

inconsistent with that good faith which is due to his creditors.

"If there be (says Lord Hardwicke) a voluntary conveyance of a real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void." *Townsend* v. *Wyndham*, 2 Ves. 11. See also *Stileman* v. *Ashdown*, 2 Atk. 481. *Doe* v. *Routledge*, Cowp. 711. *Russell* v. *Hammond*, 1 Atk. 13. This distinction is drawn from considerations too obvious to require illustration from cases; for if a man indebted were allowed to divest himself of his property in favour of his wife or child, his creditors would be defrauded; but if a man not indebted, and not meaning a fraud, could not make an effective settlement in favour of such objects, because by possibility he might afterwards become indebted, it would destroy those family provisions, which are, under certain restrictions, a benefit to the public as well as to the individual objects of them. See *Walker* v. *Burrows*, 1 Atk. 94. *Holloway* v. *Millard*, 1 Madd. Rep. 414. *Battersbee* v. *Farringdon*, 1 Swan. R. 106. See also *Kidney* v. *Coussmaker*, 12 Ves. 155; in which case a voluntary settlement was held to be fraudulent only against such as were creditors at the time. *Jones* v. *Bolton*, 1 Cox's R. 288. It may, however, be material to observe, that the grantor being indebted, is not the only badge of fraud; several other

who has a considerable fortune in trustee's hands, and the husband gives a judgment

circumstances are enumerated in *Twyne*'s case, 3 Co. 82, as furnishing a strong presumption that the transaction is malâ fide. If the conveyance contain a power of revocation, or a power to mortgage, it will be considered as fraudulent against creditors; *Tarback* v. *Marbury*, 2 Vern. 510; if the grantor be allowed to continue in possession, the conveyance being absolute. *Stone* v. *Grubham*, 2 Bulst. 218. But see *Campion* v. *Cotton*, 17 Ves. 263; or if the conveyance or gift be of the whole or greater part of the grantor's property, such conveyance or gift would be presumed to be fraudulent; for no man can voluntarily divest himself of all, or the most of what he has, without being aware that future creditors will probably suffer by it. But see *Kidney* v. *Coussmaker*, 12 Ves. 136. So, an assignment of property for a consideration clearly inadequate. *Mathews* v. *Feaver*, 1 Cox's R. 278. In short, if the transaction be chargeable with any circumstance sufficiently strong to raise a presumption of its being a fraud, it cannot be supported unless some other consideration be interposed to obviate the objection arising from the general nature of the transaction; as where the husband after marriage being indebted, conveyed an estate to trustees, to the separate use of his wife; it was held that the trustees, having undertaken to indemnify the husband against the wife's debts, was sufficient to support the settlement, as made for a valuable consideration; *Stevens* v. *Olave*, 2 Bro. Rep. 90. But if this transaction had been with a view to defraud creditors, it would probably have been set aside; for "if the transaction be not bonâ fide, the circumstance of its being even for a valuable consideration, will not alone take it out of the statute," per Lord Mansfield. *Cado-*

to make a settlement upon her, equity will not set this aside in behalf of creditors,

gan v. *Kennet*, Cowp. 434. *Stileman* v. *Ashdown*, 2 Atk. 477. The cases of *Jones* v. *Marsh*, Forrest. 64; and *Hungerford* v. *Earl*, 2 Vern. 261; may be thought to weaken the authority of the distinction taken by Lord Hardwicke in *Townsend* v. *Windham*; Lord Talbot having, in *Jones* v. *Marsh*, declined giving any opinion how far a family settlement, without consideration, would be fraudulent against subsequent creditors, though the party was not indebted at the time; and Hutchins, Lord Commissioner, having held such settlement to be void. It is observable, however, that Lord Talbot was not by the circumstances of the case before him, called upon to give his opinion; and that the opinion of Hutchins, Lord Commissioner, was evidently influenced by the provisions of the settlement not having been pursued. See *Lush* v. *Wilkinson*, 5 Ves. 384. *Brown* v. *Carter*, 5 Ves. 862. *Estwick* v. *Caillaud*, 5 T. Rep. 420. See also *Mathews* v. *Feaver*, in which case Lord Kenyon, then Master of the Rolls, held, that though a meritorious consideration, it would not prevail against creditors. 1 Cox's Rep. 280. As to a settlement after marriage, in consideration of a parol agreement before marriage, see *Dundas* v. *Dutens*, 2 Cox's Rep. 235. But see also *Spargeon* v. *Collier*, 1 Eden's R. 62, and the cases referred to in a note.

But though creditors may, under some circumstances, avoid a voluntary conveyance, yet it is binding on the party, and all claiming under him, as volunteers; *Hawes* v. *Leader*, Cro. Jac. 270. *Brookbank* v. *Brookbank*, 1 Eq. Ca. Ab. 168. *Rand* v. *Carturight*, Nelson, 101. 22 Vin. Ab. 18. *Franklin* v. *Thornbury*, 1 Vern.

though the settlement was after marriage, and voluntary (3); for the court would not have let the husband have had the fortune without making a settlement (*b*). And the

(3) *Moor* v. *Rycault*, Pre. Ch. 22. *Colville* v. *Parker*, Cro. Jac. 153. *Hinton* v. *Scott*, Moseley, 336. *Middlecome* v. *Marlow*, 2 Atk. 519. *Ward* v. *Shallet*, 2 Ves. 16. *Hilton* v. *Biscoe*, 2 Ves. 308. *Wheeler* v. *Caryll*, Amb. 121. *Cappodoce* v. *Peckham*, 4 May, 1792, Ch. See c. 2, 5, 6. note (k), p. 94.

132. *Villers* v. *Beaumont*, 1 Vern. 100. *Bale* v. *Newton*, 1 Vern. 464. *Lord Lincoln*'s case, cited in *Clavering* v. *Clavering*, 2 Vern. 475. *Sneed* v. *Culpepper*, 22 Vin. Ab. 24. pl. 3. *Williams* v. *Sawyer*, Sel. Ca. in Ch. 6. And if there be two or more voluntary conveyances, the first shall prevail, unless the latter be for payment of debts; *Goodwyn* v. *Goodwyn*, 1 Ch. Rep. 92. 2 Ch. Rep. 199. But a voluntary conveyance is not binding on the creditors of the grantor, if he become a bankrupt, for the assignees may impeach transactions which the bankrupt could not. *Anderson* v. *Maltby*, 2 Ves. jun. 255. But see *Innes* v. *Baugh*, 22 Vin. p. 22. E. pl. 1.

(*b*) It is observable that in the cases referred to, the court does not appear to have adverted to the amount of the settlement; a circumstance which, in some cases, may deserve consideration; see *Pringle* v. *Hodgson*, 3 Ves. 617. for as the equity of the wife does not extinguish the legal right of the husband, it were not too much to contend, that if the settlement by the husband, he being indebted at the time, went beyond what the court would have enforced, that such settlement, as to the excess, was a fraud on the creditors. That the equity of the wife may be satisfied by less than the amount of her fortune, see *Worrall* v. *Marlar*, 1 P. Wms. 459, in a note, Cox's Ed. But see *Like* v. *Beresford*, 3 Ves. 506. *Campion* v. *Cotton*, 17 Ves. 263, and the cases there referred to.

statute did not mean to alter the nature of the debt: so that if the debt do not bind the heir, but merely the personal assets, it will not affect a volunteer with power of revocation, unless reduced to a judgment during the life of the debtor (4). And even a debt that does affect the heir will not bind a purchaser of the volunteer with notice, till it is placed upon the land by the judgment: for if it were otherwise, personal security would be turned into real security (5). And some think that fraudulent conveyances are made so only by the several statutes made for that purpose. And therefore if the debtor makes a purchase in trustees' names, he may declare the trust to whom he pleases; for he might have given him the money to have made the purchase himself; and it is a new pretence to say a man made a purchase fraudulently (6). But although regularly for cases within the statute relief must be had at law, yet if goods are given to defraud creditors, in such a case as the gift is not avoidable by the statutes, the party may be relieved here (c);

(4) *Parslowe* v. *Weedon*, T. 1718. 1 Eq. Ca. Ab. 149. But see Forrest. 64. where the above case is observed upon.

(5) Gilbert's Lex Prætoria, 293, 294. *Prodgers* v. *Langham*, 1 Sidert. 133.

(6) *Fletcher* v. *Sidley*, 2 Vern. 490. *Kingdome* v. *Bridges*, 2 Vern. 67.

(c) The statutes, 50 Ed. III. c. 6; 3 H. VII. c. 4; expressly declare all gifts, &c. of goods and chattels, intended to defraud creditors, to be null and void.

for this court determined concerning charities and frauds long before any statute made concerning the same (7).

(7) *Hungerford* v. *Earl*, 2 Vern. 262.

White v. *Hussey*, Pre. Ch. 13, 14. *Colston* v. *Gardner*, 2 Ch. Ca. 43.

Creditors might however still, in some cases, be defrauded, by their debtors executing powers of appointment in favour of mere volunteers, unless courts of equity interposed, and made such voluntary appointment primarily subject to the payment of debts. *Thompson* v. *Town*, 2 Vern. 319. *Lassels* v. *Lord Cornwallis*, 2 Vern. 465. *Townsend* v. *Wyndham*, 2 Ves. 1. But though courts of equity will subject a voluntary appointment to the payment of debts, yet they will not interpose where the debtor has not executed his power of appointment, *Lassels* v. *L. Cornwallis*, 2 Vern. 465. *Townsend* v. *Wyndham*, 2 Ves. 1. See also *Rease* v. *Stileman*, Hob. 9, as to the rule of law; and query, whether an executor is such an assignee as will entitle him to claim the fund the subject of appointment? Hob. 9. 10.

SECTION XIII.

AND these statutes, made against frauds, are for the public good, and therefore to be taken by equity (1,) and bind the king (2); and the word (declare) in the act of 13 Eliz. shews (3) it was the common law before (*d*). nor does that act extend only to creditors, but to all others who have any cause of action (*e*) or suit, or any penalty or forfei-

(1) *Gooch's* case, 5 Co. 60. a. See sect. 12. note (a).
(2) *Magdalen College's* case, 11 Co. 72. 2 Inst. 681. See *Rix* v. *Porlington*, 1 Salk. 162.
(3) Co. Litt. 76b. a. 290.

(*d*) At common law, fraudulent gifts or conveyances were avoidable by persons, creditors at the time such gift or conveyance was made, but not by subsequent creditors. *Twine's* case, 3 Co. 83. a. *Upton* v. *Basset*, Cro. El. 444. Dyer, 294, 295. The statute 13 Eliz. c. 5, has also superadded certain penalties, to which the parties to a fraudulent gift or conveyance were not subject at common law.

(*e*) In the case of *Luckner* v. *Freeman*, Pre. Ch. 105, a distinction appears to have been taken between the claims of real creditors and a debt founded in maleficio; for *A.* having brought an action against *B.* for lying with his wife, *B.* assigned his estates to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name. *A.* recovered 5,000 *l.* damages, and brought his bill to set aside this deed as fraudulent; but the court held that it was not fraudulent either in law or equity; for that the plaintiff was no creditor at the making of the deed; and though

ture, either to the king or the subject; as for felony, outlawry, recusancy, or the like (4). But there is a difference between purchasers and creditors; for the statute of the 13 El. makes only fraudulent conveyances void against creditors; but in the case of a purchaser, all voluntary conveyances are void by the express letter of the 27th Eliz. (5) without more (*f*). And the notice of

(4) 3 Co. 82. a. *Leonard* v. *Bacon*, Cro. Eliz. 233.

(5) C. 4.

it were made with an intent to prefer his real creditors before this debt, when it came afterwards to be a debt, yet it was a debt founded only in maleficio, and therefore it was conscientious in him to prefer the other debts before it. But the plaintiff was held to have an interest in the surplus after payment of the other debts.

(*f*) The second section of the 27 Eliz. enacts, that all conveyances, &c. of lands, made with an intent to defraud and deceive such persons, &c. as shall purchase such lands, &c. for money or other good consideration, shall be utterly void; the fourth section expressly excepts conveyances made upon good consideration and bonâ fide.

On the construction of this act it has been held that every voluntary conveyance shall be presumed to be fraudulent against a subsequent purchaser. *Bovey's* case, 1 Ventr. 194. *Douglas* v. *Ward*, 1 Ch. Ca. 100. *Holford* v. *Holford*, 1 Ch. Ca. 217. *Colville* v. *Parker*, Cro. Jac. 158. *Evelyn* v. *Templar*, 2 Bro. C. R. 148. But if the conveyance, though voluntary, appear to have

the purchaser, viz. of the fraud (*g*), cannot make that good which an act of parlia-

been made for a meritorious consideration, and without fraud or covin, it shall not be void against a subsequent purchaser; for "there is no part of the act which affects voluntary settlements eo nomine, unless they are fraudulent;" *Doe* v. *Routledge*, Cowp. 708. *Hamerton* v. *Milton*, 2 Wils. 356. Tri. T. 1795. See *Myddleton* v. *Ld. Kenyon*, 2 Ves. jun. 410. *Jones* v. *Marsh*, Forrest. 64. *Sagittary* v. *Hide*, 2 Vern. 44. As to what shall be deemed a meritorious consideration, see the above cases, and also *Hunt* v. *Matthews*, 1 Vern. 408. *Jennings* v. *Sellack*, 1 Vern. 467. *Newstead* v. *Searle*, 1 Atk. 265. See c. 4. s. 12. note (*a*). And though a conveyance be covinous in its creation, it may acquire validity by subsequent matter; as where the land conveyed be afterwards aliened or settled for valuable consideration; *Prodgers* v. *Langham*, 1 Sid. 133, 134. *Newport*'s case, Skin. 423. *Smartle* v. *Williams*, 3 Lev. 387. It has also been held, that a purchaser, to avail himself of this act, must be a purchaser for money or other valuable consideration; *Twine*'s case, 3 Co. 83. a. *Upton* v. *Basset*, Cro. Eliz. 444. See also 2 Com. Dig. (4 I. 2.) p. 230. 1 Eq. Ab. 358, margin.

(*g*) Gooch's case determines, that a purchaser shall avoid a *fraudulent* conveyance, notwithstanding his notice of the fraud; but it by no means bears out the author's apparent inference, that all *voluntary* conveyances are *fraudulent*, and therefore absolutely void, though the purchaser have notice of them. The terms of the second section of the 27 Eliz. c. 4, seem to be sufficiently distinct to confine its operation to such conveyances as are made with an intent to defraud and

ment makes void, for they are always fraudulent against purchasers (6); and therefore

(6) *Gooch's* case, 5 Co. 60. b. *Tomkins* v. *Ennis*, 1 Eq. Ca. Ab. 334. pl. 6. *Leach* v. *Dean*, 1 Ch. Rep. 78. *Evelyn* v. *Templer*, 2 Bro. Rep. 148.

deceive subsequent purchasers: but it were difficult to maintain that a conveyance was made with an intent to defraud a person who, before he became a purchaser, had full notice of such conveyance. See *White* v. *Stringer*, 2 Lev. 105. And if the terms of the act do not compel a construction in favour of a purchaser, with notice of a voluntary conveyance, the policy and spirit of the act appear to me to reject such construction. The policy of the act was to prevent fraud; the construction most favourable to such purpose is that which excludes all temptation to the practice of it. A voluntary deed is binding on the party, and all claiming under him as subsequent volunteers; (see 22 Vin. Ab. 16, et seq.) and to allow him to defeat his bounty in favour of a purchaser for valuable consideration, without notice, is merely to prefer a higher consideration; but to allow a purchaser, with notice, to supersede the claims of a volunteer, seems to encourage a breach of that respect which is morally due to the fair claims and interests of others: it may render the provision of a statute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it. I shall not pursue the point further; it seems, however, deserving consideration; for if the construction of this act, which has certainly prevailed in favour of purchasers with notice, were traced, it would probably appear to have originated in the opinion that the act avoided all *voluntary* conveyances whatever, though, as very strongly observed by Lord Mansfield, in *Doe* v. *Routledge*, it merely affects *fraudulent* con-

any person coming in by a voluntary conveyance, and pursuing a purchaser at law, shall be obliged to discover his title in a court of equity, for else he might be put to encounter evidence he never heard of. But he that would have benefit of this act ought to be a purchaser bonâ fide, and in vulgar intendment, viz. for a valuable consideration, as a lessee at a rack-rent, though he paid no fine, because he is bound to pay his rent during the term, whether the land is worth it or not (7). And this statute is very well penned; for the words of the act are general, and whoever sells it, the purchaser shall avoid such fraudulent estate (8), &c. So where a man in a secret manner made an estate to the use of his wife, for her jointure, by fraud and covin, to defeat a purchaser to whom he intended to sell the land; if the fraud be proved in evidence, or confessed in pleading, the purchaser shall avoid the estate (*h*).

(7) *Shaw* v. *Standish*, 2 Vern. 326.

(8) *Burrell's* case, 6 Co. 72. b.

veyances. See *Pulvertoft* v. *Pulvertoft*, 18 Ves. 86. *Buckle* v. *Mitchell*, 18 Ves. 100. *Smith* v. *Garland*, in which latter case his Honour the Master of the Rolls, took the distinction between the settler of the estate seeking the specific performance of a contract to purchase the settled estate, and the person with whom he had contracted to sell it, seeking the specific performance of such contract, 2 Meriv. 123.

(*h*) I have not been able to find the cases referred to. It probably, however, involved circumstances of collusion between the husband and wife, or else was a jointure after marriage; for if it was a jointure before marriage, and such as would, by the 27 H. VIII. c. 10, bar the dower of the wife, it should seem, whatever might be the secret motive of the husband, the jointure would be entitled to prevail, unless the wife could be affected with privity to the fraud. If the jointure was after marriage, then the case falls within the general rule, that the discharge of a moral obligation shall not be made the pretence of a fraud on legal rights, and whether the wife was privy or not, would be immaterial. See *Colville* v. *Parker*, Cro. Jac. 158; for in such case, "it is the motive of the giver, not of the acceptor, which is to weigh," per Lord Northington, *Partridge* v. *Gopp*, Ambl. 596.

SECTION XIV.

AND though upon the statute of fraudulent devises (*i*), it has been objected, that

(*i*) Before the statute against fraudulent devises, 3 W. & M. c. 14, bond and other specialty creditors, whose debts did not immediately affect the lands of their debtors, were liable to be defrauded, either by their debtor devising his lands, or by the alienation of the heir before any action could be brought against

the statute being introductive of a new law, the relief upon it ought to be at law (1), yet

(1) *Bateman* v. *Bateman*, Pre. Ch. 198.

him: to obviate these frauds, the statute declares all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, fraudulent and void, as against creditors by bond or other specialties; and that such creditors may maintain their actions jointly against the heir and the devisee; and that if the heir alien before action brought, he shall be liable to the value of the land; and that the devisee shall be chargeable in the same manner as the heir would have been, if the lands had descended. By these provisions the bond-creditor is, in some degree, protected against the fraud of his debtor or of his heir; but the statute having expressly excepted devises for payment of debts, or for raising children's portions in pursuance of any agreement or contract made before marriage; bond and other specialty creditors, whose demands do in their nature affect the land, are still liable to be prejudiced by the right of their debtor to devise his real estate: for if he devise, subject to the payment of debts, his simple contract creditors will be entitled to be paid, pari passu, with such bond or other specialty creditors; for in conscience their debts are to be equally favoured, being equally due. *Woolstoncroft* v. *Long*, 1 Ch. Ca. 32. 3 Ch. Rep. 7. *Hixhon* v. *Whitham*, 1 Ch. Ca. 248. *Anon.* 2 Ch. Ca. 54. *Girling* v. *Lee*, 1 Vern. 63. *Child* v. *Stephens*, 1 Vern. 101. *Sawley* v. *Gower*, 2 Vern. 61. *Wilson* v. *Fielding*, 2 Vern. 763. And even creditors, whose demands are barred by the statute of limitations, shall be let in; *Gofton* v. *Mill*, 2 Vern. 141. And though it has been held in some cases, that if the estate be devised to the executor for payment of debts,

equity will also give relief (2); as where the heir having aliened the estate, a bond creditor brings a bill against him and the purchaser (*k*). But although, by that statute a man is prevented from defeating his creditors by his will, yet any settlement or disposition he shall make in his life-time, of his lands, whether voluntary or not, will

(2) *White* v. *Hussey*, Pre. Ch. 14. *Hungerford* v. *Earle*, 2 Vern. 261.

such circumstances will render the estate legal assets; (see 2 V. B. 6. p. 2. c. 2. s. 1.) yet it seems to be now settled that "the circumstance of giving the real estate by any means to the executor shall not occasion the produce of it, when sold, to be applied as it would in the ecclesiastical court; but it must nevertheless be considered as equitable assets." Per Lord Thurlow, C. *Newton* v. *Bennett*, 1 Bro. Rep. 135. See also *Silk* v. *Prime*, 1 Bro. Rep. Additions, p. 7. But if the estate descends to the heir, charged with the payment of debts, it will still be legal assets: *Freemoult* v. *Dedire*, 1 P. Wms. 430. *Plunkett* v. *Penson*, 2 Atk. 290. *Batson* v. *Lindegram*, 2 Brown's Rep. 94, contra.

(*k*) The case referred to is *Bateman* v. *Bateman*, in which the Lord Keeper is reported to have held, that the plaintiff ought to have proceeded at law; Pre. Ch. 198. But, in 1 Eq. Ca. Ab. 149. pl. 6, the Lord Chancellor is stated to have relieved the plaintiff. But, Q. if the decree was against the purchaser from the heir, he being protected by the statute? *Matthews* v. *Jones*, Anstr. Rep. 506. That equity has a concurrent jurisdiction with courts of law, upon the several statutes against fraud, see *White* v. *Hussey*, Pre. Ch. 14; and the cases referred to, B. 1. c. 1. s. 3. p. 12.

be good against bond-creditors (*l*); for that was not provided against by the statute, which only took care to secure such creditors against any imposition which might be supposed in a man's last sickness; but if he gave away his estate in his life-time, this prevented the descent of so much to the heir, and consequently took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatsoever on lands in the hands of the obligor, much less can it be so when they are given away to a stranger (3).

(3) *Parslow* v. *Weedon*, 1 Eq. Ca. Ab. 149. pl. 7. 13 Vin. Ab. 522.

(*l*) Mr. Vernon, Pre. Ch. 521, in referring to the case of *Parslow* v. *Weedon*, observed, that till that resolution he should have been of another opinion, such a disposition having been held fraudulent by Lord Chief Justice Holt, in the case of *Templeman* v. *Beke*. See *Jones* v. *Marsh*, Forrest. 64, where *Parslow* v. *Wheedon* is observed upon.

SECTION XV.

So if a freeman of London (*m*) makes a gift of any part of his personal estate in his life-time, or if he turns all his estate into a purchase of land, he may dispose

(*m*) In *Kemps* v. *Kelsey*, Pre. Ch. 594, Lord Macclesfield, C. stated "the custom of London to be the remains of the old common law, that a man could not give away any part of his estate without the consent of his children, and is so taken notice of by Bracton; but it being found extremely inconvenient and hard, it was by the tacit consent of the whole nation grown into disuse, for no law has been ever made to repeal it. But in the city of London, where the mayor and aldermen had the care of orphans, they by that sole authority and power have preserved this part of the common law in London." By this law, if a freeman of London dies leaving a widow and children, his personal estate, after his debts are paid, and the customary allowance for his funeral and the widow's chamber, being first deducted, is to be divided into three equal parts, and thus disposed of: one third part to the widow, another third part to the children unadvanced by him in his life-time, and the other third part such freeman may bequeath by will. But if a freeman of London has no wife, but has children, the half of his personal estate belongs to his children, and of the other half he may dispose by will or otherwise; Laws of London, 69. Fitz. N. B. 122. 2 Ins. 33. *Northey* v. *Strange*, 1 P. Wms. 340. *Hedges*

of this as he thinks fit (1). So if money be given by a freeman, to be laid out in land, and settled (2), &c. or if a freeman, upon a second marriage, conveys leases in trust, &c. and in the settlement there is an agreement that the trustees should sell these leases, and invest the money in the purchase of lands of inheritance to be settled to uses: by the agreement, these leases are now to be considered, in equity, as if a purchase had been actually made (*n*), and the freeman had paid the money out of his pocket (3).

(1) *Turner* v. *Jennings*, 2 Vern. 612. 685. *Hall* v. *Hall*, 2 Vern. 277. *Dethick* v. *Banks*, 2 Ch. Rep. 48.

(2) *Babington* v. *Greenwood*, 1 P.Wms, 532. *Frederick* v. *Frederick*, 1 P.Wms. 719. *Annard* v. *Honeywood*, 2 Ch. Ca. 117. 1 Vern. 345. 2 Ch. Rep. 97.

(3) *Hancock* v. *Hancock*, 1 Eq. Ca. Ab. 153. pl. 8.

v. *Hedges*; 1 Bro. P. C. 254. The custom, however, extends only to personal estates, probably from the citizens of London, in the origin of this custom, not regarding real estate, supposing freemen would not purchase such estate, but rather employ their fortunes in trade, for the benefit of commerce; 1 Eq. Ca. Ab. 150. marg. See also 2 Ves. 593. But though estates of inheritance, or freehold in houses, lands, &c. or terms to attend the inheritance, are not within the custom, *Rich* v. *Rich*, 2 Ch. Ca. 160; *Dowse* v. *Dorival*, 1 Vern. 104; *Tiffin* v. *Tiffin*, 2 Freem. 66; yet a mortgage in fee is within the custom; *Thornborough* v. *Baker*, 1 Ch. Ca. 285.

(*n*) This is agreeable to the principle of equity, which considers things agreed to be done as actually done. See c. 6. s. 9.

SECTION XVI.

But the custom of London must be entirely given up, if equity would not assist to set aside conveyances (*o*) in fraud of the custom (1): and therefore where a freeman had not altogether dismissed himself of the estate in his life-time, and the deed being made when he was languishing, and but a little before his death, it ought to be looked upon as a donatio causa mortis (*p*), but

(1) *Topp* v. *Topp*, Toth. 51. *Bomkyns* v. *Ladbroke*, 2 Ves. 591.

(*o*) Equity will not only set aside conveyances, in fraud of the custom, but will decree the personal estate to be divided according to the custom, if the owner, for valuable consideration, appear to have agreed to take up his freedom. *Frederick* v. *Frederick*, 1 P. Wms. 710.

(*p*) "Donatio causâ mortis is, when a person, in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, (under which have been included bonds and bills drawn by the deceased upon his banker,) to keep, in case of his decease. See *Bryson* v. *Brownrigg*, 9 Ves. 1. This gift, if the donor dies, need not the assent of his executor; yet it shall not prevail against creditors, and is accompanied with this implied trust, that if the donor lives, the property shall revert to himself, being only given in contemplation of

will stand good as to a moiety, which he, having no wife, might dispose of (2). So if a man has it in his power, as by keeping the deed, &c. or if he retains the possession of the goods, or any part thereof (3); or if there be a deed of trust to the use of his will (4): or to pay any sum as he should appoint, and he makes an appointment by deed and will, this will be deemed fraudulent and void (5). So if a man, possessed of a term for years, voluntarily assigns it as a provision for his child (6), yet his wife shall have her customary share (*q*). So a voluntary judgment shall not prevail against debts by simple contract, nor against the

(2) *Turner* v. *Jennings*, 2 Vern. 612.
(3) *Finner* v. *Longland*, 2 Eq. Ca. Ab. 263, 264. pl. 5. 2 Vern. 612, 685. *Hall* v. *Hall*, 2 Vern. 277.
(4) *Nott* v. *Smithies*, 1 Ch. Rep. 45.
(5) *Turner* v. *Jennings*, 2 Vern. 685.
(6) *City* v. *City*, 2 Lev. 130; but see *Clerke* v. *Leatherland*, 2 Vern. 98.

death, or mortis causa." 2 Bla. Com. 514. *Blount* v. *Burrow*, 4 Bro. Rep. 72. *Hill* v. *Chapman*, 2 Bro. Rep. 612. *Tate* v. *Hilbert*, Ch. Rep. 287. And as such donation may be avoided by creditors, so may it by the wife or children of a freeman, if it break in on their customary shares. *Turner* v. *Jennings*, 2 Vern. 612.

(*q*) But though the husband cannot deprive the wife of her customary part, yet she may be bound by an express agreement, before marriage, to accept a jointure in lieu of it; *Bravell* v. *Pocock*, 2 Freem. 67. *Atkins* v. *Waterson*, 1 Eq. Ca. Ab. 157, 158. And in such case the husband's estate shall be distributed as if there were no wife; *Pusey* v. *Desbouverie*, 3 P. Wms. 321. *Lewin* v. *Lewin*, 3 P. Wms. 15. *Metcalf* v. *Ives*, 1 Atk. 63. *Morriss* v. *Burroughs*, 1 Atk. 399. That a legacy

widow of a freeman (7); but his debts being paid, the judgment will bind the legatory part (*r*). And although the father cannot dispose of the customary part from his children, yet he may by his will (*s*) appoint, that if one dies before twenty-one, another shall have his part (8). Yet he cannot devise his child's part over to another, in case that child die in minority (9). But see now the late statute 11 Geo. I.

(7) *Fairbeard* v. *Bowers*, 2 Vern. 202. Pre. Ch. 17.

(8) *Hammond* v. *Jones*, 1 Lev. 227.

(9) *Pate* v. *Hatton*, 1 Ch. Ca. 199. *Biddle* v. *Biddle*, cited in a note, 1 P. Wms. 118.

to a wife on condition that she release her customary share, will not bar her, in the event of the residue devolving on the testator's next of kin by the death of the residuary legatee in the testator's life-time. See *Pickering* v. *Lord Stamford*, 3 Ves. 332. *Waring* v. *Ward*, 5 Ves. 670. *Leake* v *Robinson*, 3 Meriv. 363. *Noel* v. *Lord Henley*, Ex. Hil. T. 1819.

(*r*) And would be preferred to Legacies; *Cray* v. *Rooke*, Forrest. 156. *Jones* v. *Powell*, 1 Eq. Ca. Ab. 84. pl. 2.

(*s*) It was formerly much doubted whether a freeman's will could in any way operate on the orphanage part; it seems now, however, to be settled that a freeman cannot devise either the orphanage part, or the contingency of the benefit of survivorship among orphans; but such freeman may give by will, to his children, legacies inconsistent with the distribution under the custom, and then the children must elect whether they will abide by the will or by the custom. *Hervey* v. *Desbouverie*, Forrest. 130.

cap. 18, which has made a great alteration in these matters (*t*).

(*t*) The 11 G. I. c. 18. s. 17, enacts, That it shall and may be lawful to and for all and every person and persons who shall, at any time, from and after the 1st day of June 1725, be made or become free of London, and also to and for all and every person and persons who are already free of the said city, and on the said 1st day of June, 1725, shall be married, and not have issue by any former marriage, to give, devise, will, and dispose of his and their personal estate and estates, to such person or persons, and to such use and uses, as he or they shall think fit: provided, nevertheless, that in case any person who shall at any time or times, from and after the said 1st day of June 1725, become free of the said city; and any person or persons who are already free of the said city, and on the 1st day of June 1725, shall be married, and not have issue by any former marriage, hath agreed, or shall agree by any writing under his hand, upon or in consideration of his marriage or otherwise, that his personal estate shall be subject to, or to be distributed or distributable according to the custom of the city of London; or in case any person so free, or becoming free as aforesaid, shall die intestate, in every such case the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and be distributed and distributable according to the custom of the said city, any thing therein contained to the contrary in anywise notwithstanding.

SECTION XVII.

We are likewise unable to oblige ourselves to any performanee about the goods or actions of other men, not subject to our disposal; and therefore no man's contract can be carried into execution in equity, any further than his interest or lawful power extends (1); for equity will not decree a man to commit a wrong to a third person; as to compel a tenant for life to make a disseisin or forfeiture of his estate (2), or bind one who claims paramount, as to decree an agreement of one joint-tenant (*u*) against the survivor (3); or compel a freeholder of a manor to consent to an inclosure (4) or stint of a common (5), unless the bill charge that he would be benefited by it (*x*). But because it would be incon-

Heineccius' Elem. J. N. & G. c. 14. s. 400.

(1) Puff. B. 3. c. 7. s. 10. Dig. lib. 44. ti. 7. l. 11.

(2) Brian v. Acton, 5 Vin. Ab. 533. pl. 33.

(3) *Musgrave* v. *Dashwood*, 2 Vern. 63.

(4) See *Thirveton* v. *Collyer*, 1 Ch. Ca. 48. 3 Ch. Rep. 8. Delabeere v. Bedingfield, 2 Vern. 103.

(5) *Bruges* v. *Curwen*, 2 Vern. 575.

(*u*) Unless the agreement amount to a severance of the joint-tenancy in equity; in which case equity would decree against the survivor. *Hinton* v. *Hinton*, 2 Ves. 634.

(*x*) In *Delabeere* v. *Bedingfield*, 2 Vern. 103, the Lords Commissioners observed, that there was "a great difference between an agreement for an inclosure, and

venient that an engagement, seriously entered into, should be of no effect, the law ordains, that he who undertakes for another, or makes a contract in his name, should procure a performance from him (*y*), or

an agreement only for a stint of common. It is a proper and natural equity to have a stint decreed; and though one or two humoursome tenants stand out, and will not agree, yet the court will decree it, (see *Bruges* v. *Curwen*, 2 Vern. 575, con.) but it is otherwise as to an inclosure." If, however, lands have been inclosed for a length of time, with consent of most of the parishioners, and sufficient common be left for the tenants, equity will restrain any proceedings to throw open the inclosure; *Weekes* v. *Slake*, 2 Vern. 301; *Arthington* v. *Fawkes*, 2 Vern. 256; *Piggot* v. *Kniveton*, Toth. 109. See Statute of Merton, 2 Inst. 84.

(*y*) Upon this principle courts of equity have, in some cases, decreed the husband to procure the wife to join in a conveyance of her real estate, he having covenanted to such effect; *Hale* v. *Hardy*, 3 P. Wms. 189. *Barrington* v. *Horn*, 2 Eq. Ca. Ab. 17, pl. 7. *Stephenson* v. *Morris*, 7 Ves. 474. But it is observable, that though the agreement of the husband, that his wife shall do any particular act, affords a reasonable presumption that he has previously gained her consent; yet, "if after all, it can be made appear to have been impossible for the husband to procure the concurrence of his wife, (as suppose there are differences between them,) surely the court is not to decree an impossibility, especially where the husband offers to return all the money, with interest and costs." See the reporter's note to *Hale* v. *Hardy*. A further objection to such a

stand in his stead (6); as if A. articles on the behalf of B. to purchase four houses in Jamaica, and, pending the suit, to compel the seller to make a good title, the houses are swallowed up by an earthquake (7); yet A. shall pay the money, although he has not sufficient effects of B.'s in his hands (z).

(6) Puff. B. 3. c. 7. 10 Inst. lib. 3. ti. 20. s. 3. 1 Domat. B. 1. ti. 1. s. 2. 6. See *Lilly* v. *Hedges*, 1 Str. 553.

(7) *Cass* v. *Rudele*, 2 Vern. 280.

decree may be drawn from its tendency to encourage that coercion and undue influence which the policy of our law so anxiously endeavours to restrain in all concerns respecting the real property of the wife. Nor does the case of the covenantee apparently entitle him to so much respect; for he must be considered as being fully apprised of the difficulties, and to have rested his pretensions on the event of their being removed; see *Emery* v. *Wase*, 5 Ves. 846. *Howel* v. *George*, 1 Madd. R. 6. But see *Stephenson* v. *Morris*, 7 Ves. 474. These considerations induced Lord Cowper, C. in *Outread* v. *Round*, 4 Vin. Ab. 203, pl. 4, to refuse to decree a specific performance of such a covenant, the husband offering to refund the purchase-money, with costs. See also *Brick* v. *Wheilley*, 1 Mad. R. 7, note (g).

(z) In *Pope* v. *Roots*, 7 Bro. P. C. 184, Lord C. Apsley observed, that the case (*Cass* v. *Rudele*) was misrepresented: for that by the printed cases it appeared that Cass made a title in January 1691, by conveyance executed, and the earthquake did not happen till 1692. That Rudele, by his answer, admitted he had 700*l.* in his hands, and the decree was founded on a good title, having been conveyed to him. See note to *Mortimer* v. *Capper*, 1 Bro. Rep. 157.

SECTION XVIII.

And if a third person treats for one that is absent without his order, but undertakes for his consent, the absent party does not enter into the covenant till he ratifies it; and if he does not ratify it, the person who undertook for his consent, only, shall be bound (1); as if A. and B. insolvents, apply to a scrivener, who had procured 200*l.* for A. upon their bond to C. and D. to compromise the debt, and the scrivener tells them, that C. and D. would stand to any thing that he did, and accordingly compounds it with them; yet A. and B. shall pay C. and D. their whole money, they not being any way privy to the agreement, and the scrivener shall repay them, and indemnify them according to the agreement, though he acted only as an agent (2). So if A. by writing agrees with B. and C. to pave the streets in a parish, and they, in behalf of the parish, agree to pay him for it, and this writing is lodged in the hands of B.; if A. paves the streets, he must have relief against the

(1) 1 Domat. B. 1. ti. 1. s. 2. 6. But see Pothier Traité des Obligations, par. 2. c. 6. s. 8. arti. 2. s. 1.

(2) *Parrott* v. *Wells*, 2 Vern. 127; but see *Martin* v. *Kingsby*, Pre. Ch. 209.

undertakers, and the undertakers must take their remedy over against the parish (*a*); and more especially in this case the written, agreement, which is his evidence, being in the hands of one of them (3). On the other side, where a man acts in execution of the authority given him by another, either expressly or impliedly, then it is by relation the act of that other, and he acquires no right, nor brings any obligation upon himself (*b*). Yet if a verdict is obtained against

(3) *Meriel* v. *Wymondsel*, Hard. 205. See *City of London* v. *Richmond & al'*. 2 Vern. 421.

(*a*) The general rule requires all persons interested in, or to be affected by, any demand, to be parties to the suit; but though this rule is applied to many cases, from the number of persons interested, great inconvenience must necessarily arise; (*Leigh* v. *Thomas*, 3 Ves. 312. *Parsons* v. *Neville*, 9 November 1791;) yet as it would be impracticable to make a whole parish parties to a suit, at least with any prospect of coming at justice, the general rule is, in such case, made to give way to the principle of convenience. So where it appears that the credit was given to particular persons, and not to the general fund or undertaking, equity will dispense with the general rule. See *Nixon* v. *Nixon*, 30 Oct. 1739. *Cullen* v. *Duke of Queensberry and others*, 1 Bro. Rep. 101, and the cases there cited. See also Lord Redesdale's Treatise, 144, 145. Pre. Ch. 592.

(*b*) In *Johnson* v. *Ogilby*, 3 P. Wms. 279, Lord Ch. Talbot stated the "difference to be, where the party, undertaking for or on behalf of his client, has an authority so to do, and where he has not. If such under-

an agent or trustee, equity will not relieve against such verdict (*c*), but will decree that he shall be reimbursed by his principal, and stand in the place of the creditor (4).

(4) *Langdon* v. *African* Comp. Pre. Ch. 221.

taker has no authority, then it is a fraud, and the undertaker ought himself to be liable; but where there is such an authority given, it is only acting for another, like the case of a factor or broker acting for their principals, who were never held to be liable in their own capacities;" but where one undertakes or acts for another under an authority, he must, in order to protect himself from being personally bound by such undertaking, strictly pursue his authority. See *Goodwin* v. *Gibbons*, 4 Burr. 2108. *Stone* v. *Cartwright*, 6 Term. Rep. 411. *De Bouchout* v. *Goldsmid*, 5 Ves. 211. *Fairlie* v. *Hastings*, 10 Ves. 123. 15 Ves. 164. 16 Ves. 321.

(*c*) In *Graham* v. *Stamper*, Pre. Ch. 45. 2 Vern. 146. 1 Eq. Ca. Ab. 308, the plaintiff was relieved in equity against so much of the judgment as respected the goods which he had purchased for the king's use.

SECTION XIX.

THE statute de donis conditionalibus, made 13 Ed. I. (*d*), in a manner created perpetuities (1); for by that statute the tenants in tail could do no act in prejudice of the issue, but the will of the donor was to be

(1) 2 Inst. 331. *Mildmay's* case, 6 Rep. 40. Moor, 155.

(*d*) Littleton observes, that "before this statute all inheritances were fee-simple; for all the gifts which are specified in that statute were fee-simple conditional, at the common law; sec. 13. As to the property capable of being entailed, tenement is the only word used by the statute; but this, according to Lord Coke, (1 Inst. 19. b.) includes not only all corporate inheritance, which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercisable within the same, though they lie not in tenure, as rents, estovers, commons, or other profits whatsoever, granted out of lands or uses, offices, dignities which concern lands; and some particular places may be entailed, because all these savour of the realty; but merely personal chattels, which savour not of the realty, cannot be entailed; *Neville's* case, 7 Rep. 33; neither can any office which merely relates to such personal chattels, nor an annuity which charges only the person, and not the lands of the grantor: but in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute, and by his alienation may bar the heir or reversioner. An estate to a man and his heirs, for another's life, cannot be entailed; for this is strictly

observed (*e*), and the same law continued about 200 years. But in 12 Ed. IV. it was resolved by the judges that by a common recovery the estate tail should be barred, for the mischiefs that were introduced into the common-wealth thereby (*f*).

no estate of inheritance, and therefore not within the stat. de donis, *Baker* v. *Bailey*, 2 Vern. 225; but see *Finch* v. *Tucker*, 2 Vern. 184. Neither can a copyhold estate be entailed by virtue of the statute: for that would tend to encroach upon and restrain the will of the lord; but by special custom a copyhold may be limited to the heirs of the body; *Heydon*'s case, 3 Rep. 8. b.; for here the custom ascertains and interprets the lord's will; see 2 Bla. Com. 113. But though estates pur autre vie and personal chattels are not entailable, they may, however, be so settled as to answer the purposes of an entail, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. See *Low* v. *Baron*, 3 P. Wms. 262; and Mr. Hargrave's note (5), Co. Litt. 20. a. b. where the cases upon this subject are brought together and distinguished. See also *Norton* v. *Frecker*, 1 Atk. 523.

(*e*) Voluntas donatoris in chartâ suâ manifeste expressâ observetur. Co. Litt. 21. a.

(*f*) The decision in Taltarum's case, that a common recovery should bar and destroy the entail, having greatly abridged estates tail with regard to their duration, other means were soon devised to strip them of other privileges. By 26 H. VIII. c. 13, such estates are made subject to forfeiture for high-treason. By 32

And by 4 H. VII. cap. 24 (*g*), a fine had the same force given it as to the issue in tail, though it did not extend to him in remainder, without he neglected to make claim within five years after it fell into possession (2); and this court will not supersede fines and recoveries; as to make a bargain and sale of tenant in tail of a legal estate good against the heir; for he is, since the statute, to be considered as a purchaser, and is in immediately from the

(2) Co. Litt. 372. a.

H. VIII. c. 28, leases made by tenant in tail, which do not tend to the prejudice of the issue, are declared to be good, and to bind the issue. By 32 H. VIII. c. 36, a fine by tenant in tail is, by the construction of the 4 H. VII. c. 24, declared to be a bar to the issue, and all claiming under them. By 21 Jac. I. c. 29, estates tail are made liable to be sold by the assignees of a bankrupt tenant in tail; and by the construction of 43 Eliz. c. 4, the appointment of tenant in tail to a charitable use is declared to be good, without either fine or recovery. But in these cases the right of the crown, having the reversion, is (subject to particular exceptions) saved by the 34 & 35 H. VIII. c. 20. See Co. Litt. 372. Cruise on Recoveries, 256. By these provisions of the legislature, estates tail are now more free and capable of alienation, than were conditional fees at common law; which could not be made absolute till the condition was performed, and then only for particular purposes. See Co. Litt. 19. a. 2 Bla. Com. 110, 111, Mr. Butler's note (1). Co. Litt. 326. b.

(*g*) See 32 H. VIII. c. 36.

donor per formam doni (3). So that, as it seems, no act of tenant in tail shall be carried into execution in a court of equity against the issue any further than at law; for this would be to repeal the statute de donis (*h*): but if the issue enters, and accepts of the agreement, it becomes his own, and shall bind him (4); and any agreement, with an equivalent, will bind the issue as a partition (*i*), though but by parol (5); nor will the court aid the issue in tail (*j*)

(3) *Sayle* v. *Freeland*, 2 Ventr. 350. *Cavendish* v. *Worsley*, Hob. 203. *Powell* v. *Powell*, Pre. Ch. Ca. 278.

(4) *Ross* v. *Ross*, 1 Ch. Ca. 171.

(5) *Thomas* v. *Gyles*, 2 Vern. 232.

(*h*) This is to be understood as a tenant in tail of a legal estate, whose estate not being more favoured in equity than at law, cannot bind his issue by a covenant to convey, though for valuable consideration; *Ross* v. *Ross*, 1 Ch. Ca. 171. *Coventry* v. *Coventry*, 10 Mod. 469. *Hinton* v. *Hinton*, 2 Ves. 634, 638; 1 Atk. 423; nor by a covenant for further assurance, *Jenkins* v. *Keymes*, 1 Lev. 237; nor by articles to convey for payment of debts, *Herbert* v. *Fream*, 2 Eq. Ca. Ab. 28. pl. 34; nor by a covenant to levy a fine, though there be a decree for such purpose; *Weale* v. *Lower*, 1 Eq. Ab. 266. cited in *Fox* v. *Crane*, 2 Vern. 306. But see *Hill* v. *Car*, 1 Ch. Ca. 294.

(*i*) Or an exchange of lands: in either of which cases the law will imply a warranty, which descending on the issue will bind them in respect of the equivalent. Co. Litt. 174. a. 384. a. 2 Bla. Com. 300.

(*j*) This rule applies to those in remainder as well as to the issue. *Stapleton* v. *Sherrard*, 1 Vern. 212; *Kelly* v. *Berry*, 2 Vern. 35.

against a discontinuance (*k*), though by a voluntary conveyance (6); so far does it favour the owner of the inheritance who has power to dispose of it.

(6) *Sherborne* v. *Clark*, 1 Vern. 273. *Bunce* v. *Philips*, 2 Vern. 50.

(*k*) "A discontinuance of estates in lands, &c. is, in legal understanding, an alienation made or suffered by tenant in tail, or by any that is seised in auter droit, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter." Co. Litt. 325. a. See 32 H. 8. c. 28. § 6. Husband disabled from discontinuing his wife's estate. But a conveyance by lease and release by tenant in tail, does not work a discontinuance, but merely passes a base fee, voidable by the entry of the issue in tail. Litt. s. 598, 600.

SECTION XX.

As for a trust or equitable interest, it is a creature of their own, and to be governed by their rules; for an entail of a trust is not within the statute de donis (1), and therefore may be aliened without a recovery

(1) *North* v. *Champernon*, 2 Ch. Ca. 63. 78. *Carpenter* v. *Carpenter*, 1 Vern. 440. *Beverley* v. *Beverley*, 2 Vern. 131. *Sale* v. *Freeland*, 2 Ventr. 350.

by any manner of conveyance (*l*); yet some have thought the method of common recoveries a very prudent and political insti-

(*l*) This consequence seems to be too extensively drawn; for though it be now settled that the operation of fines and recoveries by the cestuy que trust, is the same upon trust estates, as upon legal estates, yet it is by no means admitted that any mode of conveyance by tenant in tail, of a trust estate, will bar the issue, and those in remainder. In *North* v. *Champernon*, 2 Ch. Ca. 64, Lord Chancellor Finch appears to have said, that tenant in tail of a trust may bar his issue by a feoffment, or bargain and sale: and in *Beverley* v. *Beverley*, 2 Vern. 131. *Carpenter* v. *Carpenter*, 1 Vern. 440. and in *Baker* v. *Bailey*, 2 Vern. 225; the same opinion seems to have prevailed.—That cestuy que trust, if the trustees join, may bar the entail by a feoffment, was determined in *Bowater* v. *Elly*, 2 Vern. 344. But in *Legatt* v. *Sawell*, 1 P. Wms. 91. 2 Vern. 552; Lord Cowper intimated his doubt, "whether only a deed executed by cestuy que trust in tail, should bar the remainder-man, or even the issue, in regard a deed may be made at a tavern, or by surprise; but a recovery is a solemn and a deliberate act." *Radford* v. *Wilson*, 3 Atk. 815; *Fletcher* v. *Tollett*, 5 Ves. 12. And the prevailing practice now is to suffer a recovery, which, however, may be done without the concurrence of the trustees. *Burnaby* v. *Griffin*, 3 Ves. 276. See also *Kirkman* v. *Smith*, 1 Ves. 260. Lord Hardwicke's opinion as to the effect of lease and release, upon an equitable estate tail. That bargain and sale will not, see *Leggatt* v. *Sewel*, 2 Vern. 552; but that an equitable estate in copyhold may be barred by surrender, see *Radfodd* v. *Wilson*, 3 Atk. 815. His Lordship, how-

tution, and fit to be followed in equity (*m*); that men may have some restraint from overturning the settlements of their family.

ever, in *Otway* v. *Hudson*, 2 Vern. 583; Lord Keeper Wright seems to have thought that a devise by will was sufficient to bar the entail of a trust; which point had been before so decided in *Woolnough* v. *Woolnough*, Pre. Ch. 228.

(*m*) The reason for dispensing with the strict rules of law, in cases of recoveries of trust estates by the cestuy que trust, is stated by Lord Nottingham, in *North* v. *Champernon*, 2 Ch. Ca. 63. 78. 1 Vern. 13. It does not, however, establish the necessity of the tenant in tail of a trust being allowed to bar the entail by every other mode of alienation.

SECTION XXI.

So the head of a corporation aggregate, as a dean, &c. alone, cannot make a lease or discontinuance; for it ought to be by the entire corporation, or else it is void except of the possessions which they have severed from the rest of the corporation: but an

abbot or bishop may discontinue (*n*), for they are sole seised in fee (1), &c. Otherwise of a parson, for he is not seised in fee to every intent (2); and a deed of an abbot, ex assensu capituli, is good, because they are dead persons in law. Otherwise of a dean ex assensu capituli; for his chapter is parcel of the corporation, and seised with the dean, and shall plead and be impleaded with him (3). So of a mayor and commonalty. But in all uncertain bodies, as mayor and commonalty, &c. if the greater part do an act (*o*), this shall bind, although

(1) Co. Litt. 325. b.

(2) Co. Litt. 300. b. 67. a. Litt. s. 644, 646.

(3) Co. Litt. 325. b.

(*n*) By the discontinuance of the abbot or bishop, the successor was driven to his writ de ingressu sine assensu capituli; but by the 27 H. VIII. 28, and 31 H. VIII. c. 13, all abbots, priors, and other religious persons are dissolved; and by the 1 Eliz. c. 19, and 13 Eliz. c. 10, 1 Jac. I. c. 3, bishops and all other ecclesiastical persons are restrained and disabled from aliening or discontinuing their ecclesiastical livings. For the learning relating to leases by ecclesiastical persons, see 3 Bacon's Ab. title Leases.

(*o*) And the agreement of the major part of a corporation being entered in the corporation books, though not under the corporate seal, will be decreed in equity; *Maxwell* v. *Dulwich Coll.* 14 July, 1783. The contrary, however appears to have been held in *Taylor* v. *Dulwich College*, 1 P. Wms. 655. But though a corporation

the rest will not agree (4), and the assent may be tried by voices or hands; quia ubi major pars ibi tota (5); else they might never all agree.

(4) *Dr. Hascard* v. *Dr. Somany*, 1 Freem. 504.
(5) Moor 578. 33 H. 8. c. 27.

cannot do an act in pais without their common seal, yet they may do an act upon record. The *Mayor of Thetford*'s case, 1 Salk 192.

SECTION XXII.

AND a corporation is in divers respects as one body, or as several persons, and may charge and be charged accordingly. The deed therefore of a corporation shall not bind them in their private capacity (*p*), if

(*p*) In a note to *Harvey* v. *East India Company*, 2 Vern. 396; the members of the Hamburgh Company are stated to have been charged in their private persons, the Company having no goods; but quere, whether the Company was a corporation? If it was, the law of the decision seems very doubtful. In the case of the *King* v. *the Corporation of Rippon*, Com. Rep. 86, it is said, that an action lies against the members of a corporation by their private names, for a false return to a

it be made in the name of their corporation (1) neither can they be charged in their private capacity with debts of the corporation, although they are dissolved (2). So they shall be intended seised in that capacity by which name they are named; and when the mayor or other head of the corporation is in prison, touching his office for a bond made by him and the commonalty; this is an imprisonment to him as mayor (*q*). So if a corporation be changed (*r*), yet they shall not be discharged of covenants, annuities, and the like, with which they were before bound (3): and by the same reason they shall retain the lands and possessions which they had before; and so debts due to them remain (4). But if the corporation

(1) City of London concerning the duty of water bailage, 1 Ventr. 357.
(2) *Edmunds* v. *Brown*, 1 Lev. 237.
(3) *Bp. of Rochester*'s case, Owen, 73. 2 And. 107. 6 Vin. Ab. 285. pl. 6, 8.
(4) *Luttrel*'s case, 4 Rep. 87. b. *the Mayor of Scarborough* v. *Butler*, 3 Lev. 237. *Haddock*'s case, 1 Ventr. 355.

mandamus, directed to the corporation by their corporate names. See also the *Mayor of Thetford*'s case, 1 Salk. 192.

(*q*) And the opinion of Brian, C. J. was, that the mayor and commonalty should have action for the imprisonment of their mayor; 6 Vin. Ab. 304; cites 21 Ed. IV. 14 & 15.

(*r*) For a corporation may refuse the new charter; and if it does, such charter is void. The *King* v. *Larwood*, Comb. 316. 1 Ld. Raym. 31.

be disolved, the donor shall have his lands again (*s*).

(*s*) This is agreeable to the opinion of Lord Coke, 1 Inst. 13. b. But Mr. Hargrave, in his note upon this point, refers to the cases of *Johnson* v. *Morris*, Hal. MSS. and *Southwell* v. *Wade*, 1 Roll's Ab. 816. and Poph. 91, as authorities against the donor, and deciding that the land shall escheat. It is observable, however, that from the report of *Johnson* v. *Norway*, Winch. 37; which he conceives to be the same case as that cited by Lord Hale, the judges do not appear to have finally determined the point; and the judgment of the court in *Southwell* v. *Wade*, according to Rolle, proceeded on the circumstance of the thing having been granted over by the corporation; and therefore, " ne escheatera al grantor coment que ceo duissoit aver eschete sil navoient ceo grant ouster." The distinction, however, admits the reversionary right of the grantor, if the thing had not been granted over; and the confusion arises from the term escheat being used as synonymous with " revert," which Rolle appears to have done in many instances, but particularly in the following passage, from the above page: " Si homme grant un rent al auter et ses heires, et il mourut sans heire ceo *eschetera al grantor*, et sera extinct en le terre" Another circumstance occurs in the case of *Southwell* v. *Wade*, which seems to render the decision favourable to Lord Coke's opinion; namely, that the faggots which were the subject of the grant, were claimed by the mayor, &c. by grant from the crown, whose right was derived, not by force of an escheat, but by grant from the masters, &c. of the hospital, who were the immediate grantees of the prior, &c. Whence it appears that the right of the crown was not rested on an escheat, but on an express

grant, which it scarcely would have been, if the claim could have been supported by the doctrine of escheat; Poph. 19. See also Godb. 211. Moore, 283; which are authorities in favour of Lord Coke's opinion, which is also adopted by Sir William Blackstone, 2 Com. 256.

SECTION XXIII.

It is also against a maxim in law, that a feme covert should be bound without a fine (1); so that a fine is necessary for the disposing of her lands in fee, or of freehold (*t*). The common law, therefore, gave

(1) Roll's Ab. 376. pl. 8.

(*t*) A married woman is as completely bound by a recovery suffered by her and her husband, as she is by a fine; Lord Cromwell's case, 2 Rep. 74, 78. *Mary Portington*'s case, 10 Rep. 43. Cruise on Recoveries, 143. But it has been doubted whether a husband, seised jure uxoris, could make a tenant to the præcipe of his wife's lands, for the purpose of a recovery, without the wife's joining him in a fine. The doubt probably arose from the language of Lord Talbot, reported in *Robinson* v. *Cummins*, Forrest. 167. But as the report of that part of the case appears, from an opinion given by Mr. Booth, and also from a MS. note of the same case, in the possession of Mr. Butler, to be erroneous, it may now be considered as the better opinion, that the husband can make a good tenant to the præcipe,

her a cui in vita after her husband's death, for the recovery of the land aliened by him, and to the heir a sur cui in vita (2). And in all cases, where the wife might have a cui in vita at common law, she may enter by the statute of 32 H. VIII. cap. 28. (*u*). And where the issue cannot have a sur cui in vita or formedon, there he shall not enter within the remedy of this statute; as during

(2) Litt. s. 594. Co. Litt. 326. a. F. N. B. 428.

for the purpose of a recovery. See Cruise on Recoveries, p. 52; and Butler's note in Co. Litt. 326. b. It seems also to be admitted, that a feme covert may reserve to herself, before marriage, the power of disposing of her real estate without fine, either by conveying in trust, or by power over an use; but Lord Hardwicke doubted, whether articles of agreement between husband and wife, that the wife might dispose of her estate, would bind the heir; *Peacock* v. *Monk*, 2 Ves. 191. This doubt, however, was done away by the House of Lords, in *Wright* v. *Cadogan*, 6 Bro. P. C. 156. See *Doe* v. *Staple*, 2 Term Rep. 695. So that a feme covert may now dispose of her inheritance, either by fine, recovery, declaration of trust, power over an use or articles; provided the trust or power be created, or the articles executed before marriage. See also *Compton* v. *Collinson*, 1 Bla. T. Rep. 334; see page 112, 113.

(*u*) The words of the act extend the right of entry to those in remainder or reversion. They are also considered to be sufficiently comprehensive to affect recoveries. Co. Litt. 326. a. and to include copyholds, 4 Co. 23.

the life of the husband; for the words of the act are, "According to their rights and titles therein," viz. (3) be it in the life of the husband after a divorce a vinculo matrimonii, for then at common law a cui ante divortium lay (4), or after his death (5). And so in equity, no agreement of the husband to part with his wife's inheritance shall bind the wife, or be carried into execution (6); but if the wife, upon private examination, consents, the court will decree an agreement of the husband to convey his wife's land (*x*): yet the bill must regularly be brought against them both; for the wife ought not by law to convey by any

(3) Greenely's case, 8 Rep. 72. b. 73.

(4) F. N. B. 454.
(5) Co. Litt. 326. a. *Broughton* v. *Conway*, Moore, 58. *Greeneley's* case, 8 Rep. 73. a.
(6) *Bryan* v. *Wolley*, 9 Feb. 1721. 4 Vin. Ab. 57. pl. 19.

(*x*) I have not been able to find the case referred to, and the law of it seems to me very doubtful; for though courts of equity will receive the consent of the wife in case of money, to be laid out in land, in which, when laid out, she would be tenant in tail; *Oldham* v. *Hughes*, 2 Atk. 453; yet I am not aware of a single case or dictum, from which it can be inferred that a feme covert can in equity bind or convey her inheritance, unless a trust-estate, by any other means than she can at law: and the rule of law is, that "no feme covert shall be barred by her confession of her inheritance or freehold, but when she is examined by due course of law; and that is the cause, that if the husband and wife acknowledge a statute or recognizance, it is void as to the wife, although she survives her husband. So if the husband and wife acknowledge a deed to be enrolled, it is void

compulsion from the husband, as it will otherwise be intended that she does. And if a feme covert agrees to sell her inheritance, so as she may have part of the money, and the land is accordingly sold, and her part of the money put into trustee's hands; this money is not liable to the husband's debts, though she afterwards agree that it should be so; nor shall any promise, made by the wife for that purpose, subsequent to the first original agreement, be obliging on that behalf (7).

(7) *Rutland* v. *Molineux*, 2 Vern. 64.

as to the wife; and the reason is, because no such writ is depending against the husband and wife, upon which the wife may be examined." *Mary Portington's* case, 10 Rep. 42. b. See Cro. J. 99. 4 Co. 23. 8 Co. 63 as to grants by husband and wife of a copyhold, they being seised of the manor in right of the wife.

SECTION XXIV.

NEITHER will equity take away the benefit of survivor from the wife, of such things as the law has cast upon her (*y*); as money,

(*y*) The property of the wife, to which she is entitled by surviving her husband, are either chattels real, or choses en action; but "with respect to her chattels

or the like, in trust, although the husband make her a jointure(1), unless it be full and

(1) *Lister* v. *Lister*, 2 Vern. 68. *Twisden* v. *Wise*, 1 Vern. 161. *Salwey* v. *Salwey*, Amb. 692.

real, as leases for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. If a man marry a woman possessed of or entitled to the trust of a present actual or vested interest in a term of years, or any other chattel real, it so far becomes his property, that during her life he may dispose of it; *Incledon* v. *Northcote*, 3 Atk. 430; and if he survives her, it vests in him absolutely; but if he does not actually dispose of it in his life-time, and she survives him, it belongs to her, and not to his representatives; for he cannot dispose of it from her by will. *Packer* v. *Wyndham*, Pre. Ch. 418. *Tudor* v. *Samyne*, 2 Vern 270. See also *Sir Edward Turner*'s case, 1 Vern. 7. *Pitt* v. *Hunt*, 1 Vern. 18. *Bates* v. *Dandy*, 2 Atk. 207. If a man marry a woman entitled to a possible or contingent interest in a term of years, if it be a legal interest, that is, such an interest as, upon the determination of the particular estate, or the happening of the contingency, will immediately vest in possession of the wife; there the husband may assign it, (*Quære?* And see *Hornsby* v. *Lee*, 2 Madd. Rep. 16,) except, perhaps, in those cases where the possibility or contingency is of such a nature, that it cannot happen during the husband's life-time; Co. Litt. 46. b. *Lampett*'s case, 10 Co. 51. a. Hutt. 17. 1 Salk. 326. But it is an exception to this rule, at least in equity, that if a future or executory interest, in a term or other chattel, is provided for the wife, by or with the consent of the husband, there the husband cannot dispose of it from the wife, as it would be ab-

adequate to her fortune (*z*). So chattels real in possession survive to the wife, except the husband dispose of or forfeit them

surd and unfair, in the highest degree, that he should be allowed to defeat his own agreement. But such provision for the wife, if made by the husband, unless before marriage, will not in general be good against creditors or purchasers. *Doyley* v. *Perfull*, 1 Ch. Ca. 225. *Turner*'s case, 1 Vern. 7. *Pitt* v. *Hunt*, 1 Vern. 18. *Walker* v. *Sanders*, 1 Eq. Ca. Ab. 58. With respect to things in action they do not vest in the husband until he reduces them into possession. *Brotherow* v. *Hood*, 2 Com. Rep. 725. But the husband may sue alone for a debt due to the wife upon bond, &c. Aleyn's Rep. 36. But if he join her in the action, and recover judgment, and die, the judgment would survive to her; *Oglander* v. *Baston*, 1 Vern. 396. *Garforth* v. *Bradley*, 2 Ves. 677. The reason of this distinction appears to be, that his bringing the action in his own name alone is a disagreement to the wife's interest, and implies his intent that it should not survive to her; but if he bring the action in the joint names of himself and his wife, the judgment being that they both recover, the surviving wife, not the representative of the husband, is to bring the scire facias on the judgment; his bringing the action, therefore, in the joint names of himself and his wife, does not in effect alter the property, or show it to be his intention that it should be altered. See Mr. Butler's note (1), Co. Litt. 351. b. From the above distinction it should follow, that where the husband sue alone, the recovery will be equal to a reducing into possession; and such was expressly stated to be the law by Lord Hardwicke, in *Garforth* v. *Bradley*, 2 Ves. 677. But in *Bond* v. *Simmonds*, 3 Atk. 21, his Lordship

(2) Co. Litt. 64, b. 351.

during the coverture (2); and he cannot charge or devise them, for the title of the

is reported to have said, "Suppose at law a husband had recovered a judgment for a debt of the wife, and had died before execution, the wife would have been entitled, and not the husband's executor." This dictum, unless the wife was joined in the action, is irreconcileable with his Lordship's opinion in *Garforth* v. *Bradley*, and is also opposed by the authority of Lord Jefferies, in *Oglander* v. *Baston*, 1 Vern. 396. It is, however, agreeable to Lord Macclesfield's opinion, in *Packer* v. *Wyndham*, Pre. Ch. 415; and *Nanny* v. *Martin*, 1 Ch. Ca. 27. Whether the benefit of a decree respecting the property of the wife, detained by the court in order to compel the husband to make a settlement, shall vest absolutely in the wife surviving her husband, seems also a doubtful point. In *Nanny* v. *Martin*, 1 Ch. Ca. 27, it was held, that the benefit of such a decree should survive, as would the benefit of a judgment at law. But in *Packer* v. *Wyndham*, Pre. Ch. 418, Lord Cowper, C. observed, that "the money in question, being paid in during the coverture, was the husband's money, and the property vested absolutely in him by law; and though this court thought fit to lay their hands on it, and had power so to do, being paid into the master's hands, yet that was only in the nature of a caution, till the husband should make some provision for his wife: it was the husband's money, but the court had a power to detain or keep it from him till he made such provision. But the wife being now dead, and no children to be provided for, the reason of their keeping the money from him is at an end, and then, æquitas sequiter legem, the court must give it to the husband's representatives, to whom, by law, it belongs." In a MS. note of *Carteret* v. *Paschal*, more full than the printed report in 3 P. Wms. 197.

wife is paramont (3). But a demise of the wife's term, though but for a fortnight (*a*).

(3) 1 Roll's Ab. 344. pl. 5 Co. Litt. 351. a.

Lord C. King, referring to the case of *Packer* v. *Wyndham*, observes, that the reason why the court decreed the money to the husband's assignees, was, because they had laid their hands on it, and the husband could not come at it: he brought his bill, and did all he could to get possession of it; so the court thought it unreasonable to deprive the party of his right by law, through any act of theirs." "Besides, a decree of this court, for the performance of a thing, is altogether like a tenancy by elegit; for transiit in rem indicatum." See also *Heygate* v. *Annesley*, 3 Bro. Rep. 362. But in *Macauley* v. *Phillips*, 4 Ves. 15, it was held, that a decree would not exclude the wife's right of survivorship, unless a settlement had been approved in pursuance of it. See also *Murray* v. *L. Elibank*, 10 Ves. 84. As to what will be a reduction into possession by the husband, see *Doswell* v. *Earle*, 12 Ves. 473; as to what not, see *Baker* v. *Hall*, 12 Ves. 497; *Wall* v. *Tomlinson*, 16 Ves. 413; *Hornsby* v. *Lee*, 2 Maddock's, 16; *Nash* v. *Nash*, 2 Mad. 133.

(*z*) If the settlement was made before marriage, or after marriage, in consideration of an agreement before marriage, the court will not advert to the adequacy; *Adams* v. *Cole*, Forrest. 168. But if the settlement be after marriage, then the adequacy of it will be material; *Druce* v. *Dennison*, 6 Ves. 385; *Lanoy* v. *D. of Athol*, 2 Atk. 448. See 3 Ves. 98. *Langham* v. *Nenny*, 3 Ves. 467.

(*a*) Such a demise would be good for the fortnight, but does not appear to be sufficient to exclude the wife surviving from the residue of the term; Lord Coke ex-

will alter the property (4). So things merely in action survive to the wife, unless recovered during the coverture, or disposed of by the husband for a valuable consideration (*b*). But an award of a sum of money is a sort of judgment, and changes the property of a legacy in her right (5). And so if the husband recover it, as he may without joining his wife; for wherever the husband is to have the thing alone, when recovered, there he need not join his wife; yet of things merely in action, belonging to

(4) *Oglander* v. *Baston*, 1 Vern. 396.

(5) *Oglander* v. *Baston*, 1. Vern. 396. "

pressly observing, that, " if a man, possessed of a term of forty years in right of his wife, maketh a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term." Co. Litt. 46. b. *Syms'* case, Cro. Eliz. 33. *Lofter's* case, Cro. Eliz. 278.

(*b*) " As the husband may assign the wife's term, so he may the trust of the wife's term, unless it be a trust from himself (or to which he is party) for the wife's benefit; he may also dispose of the wife's mortgage in fee, (*Boswil* v. *Brander*, 1 P. Wms. 458.) as well as her mortgage for a term; he may also assign her choses in action, or a possibility to which she is entitled, (see note (*y*) p. 313.) provided such assignment be for a valuable consideration; but though he cannot dispose of her choses in action without a valuable consideration, yet he may release the wife's bond without receiving any part of the money; *Bates* v. *Dandy*, 2 Atk. 207.

the wife, she ought to join in suit (*c*), and a covenant to pay it to the husband is but a collateral security, and does not alter the nature of the debt, but it shall survive to the wife (6). But it is a rule in all cases, that where a man makes a settlement equivalent to the wife's portion, it shall be intended that he was to have the portion, though there was no agreement for that purpose (*d*); the wife shall not have her jointure and fortune both, but the law of this court will presume a promise (7).

(6) *Howman* v. *Corie*, 1 Vern. 190.

(7) *Blois* v. *Lady Hereford*, 2 Vern. 502.

(*c*) In all actions real for the lands of the wife, the husband and wife ought to join; *Odill* v. *Tyrrel*, 1 Buls. 21. So for rent due in right of the wife; 1 Com. Dig. 575. 1 Roll's Ab. 347. But where the wife cannot have an action for the same cause, if she survive her husband, the action shall be by the husband alone; 1 Com. Dig. 576. 1 Roll. Ab. 347.

(*d*) This appears to have been the opinion of Lord Cowper, in the case referred to; *Blois* v. *Lady Hereford*. See also *Cleland* v. *Cleland*, Pre. Ch. 63. *Meredith* v. *Wynn*, Pre. Ch. 312. But in *Salwey* v. *Salwey*, Ambler, 692, it was held by the Lords Commissioners, that to exclude the wife from that which the law would give her, as surviving her husband, there must be an express or implied agreement, and that a settlement by the husband on the wife is not alone sufficient for such purpose; and so it had been held in *Lister* v. *Lister*, 2 Vern. 68. See also *Druce* v. *Denison*, 6 Ves. 385. *Adams* v. *Cole*, Forrest. 168.

SECTION XXV.

(1) Co. Litt. 14 a. Puff. b. 3. c. 7. 11.

AND it is a common maxim (1), that he who has the precedency in time, has the advantage in right (*e*): not that time, con-

(*e*) This rule holds good in respect of equitable rights, as well as in respect of legal rights; per Lord Hardwicke, *Clarke* v. *Abbott*, Barnard. 460; and therefore, where the legal estate is standing out, equitable incumbrances must be paid according to their priority in time; *Symes & al. Symonds*, 1 Bro. P. C. 66. *E. of Bristol & al.* v. *Hugerford*, 2 Vern. 524. *Brace* v. *Duchess of Marlborough*, 2 P. Wms. 495. *E. of Pomfret* v. *Lord Windsor*, 2 Ves. 486. *Wortley* v. *Birkhead*, 2 Ves. 571. 3 Atk. 809. But the rule is only applicable to mere equities; *Blake* v. *Hungerford*, Pre. Ch. 159. If therefore a subsequent incumbrancer, in order to protect himself against mesne incumbrances, obtains a conveyance of the legal estate, equity will not deprive him of his legal advantage, unless, at the time he lent his money, he had notice of the mesne incumbrance, or obtained the conveyance of the legal estate after decree; for though the second, or mesne incumbrance, be prior to the subsequent incumbrance in point of time, yet it furnishes a merely equal equity with the subsequent incumbrancer, who, having by greater diligence obtained the legal estate, shall be allowed to retain his advantage; *Turner* v. *Richmond*, 2 Vern. 81. *Hawkins* v. *Taylor*, 2 Vern. 29. *Morrett* v. *Paske*, 2 Atk. 52. *Matthews* v. *Cartwright*, 2 Atk. 347. *Belchier* v.

sidered barely in itself, can make any such difference, but because the whole power over a thing being secured to one person, this bars all others from obtaining a title to it afterwards. So in equity, where one party has no more equity than the other (*f*), the law must take place (2); and therefore, where it is voluntary conveyance against voluntary conveyance, you must try it at law (3). And as a voluntary conveyance cannot be revoked without a power of revocation (4), so the reason is the same where it is not pursued, because the law has

(2) Francis's Maxims, max. 14, where the cases illustrative of this rule, are classed.

(3) *Goodwin* v. *Goodwin*, 1 Ch. Rep. 92.

(4) *Villers* v. *Beaumont*, 1 Vern 100.

Bale v. *Newton*, 1 Vern. 464. 3 Ch. Ca. 107.

Renforth, 6 Bro. P. C. 28. *Robinson* v. *Davison*, 1 Bro. Rep. 63. But if the second or mesne incumbrancer has obtained a decree for an account, a subsequent incumbrancer cannot, by buying in the first incumbrance, defeat the effect of such decree. *Wortley* v. *Birkhead*, 3 Atk. 809.

(*f*) "Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no defence in bar of that title, yet if the defendant has an equal claim to the protection of the court of equity to defend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side;" Lord Redesdale's Treatise, p. 215. I shall have occasion to consider the application of this rule in B. 6. c. 3.

been liberal (g) in expounding powers of revocation favourably (5), and where the law expounds a thing according to an equitable construction, there is no reason for equity to extend it further; for it is a law which a man puts upon himself as a guard against surprise, and therefore ought to be performed in all necessary circumstances (6). But if there appear other equitable considerations, it would be convenient to give relief where there is a defect in the execution of a power, and an intention plain to do it (h), as well as to

(5) Shepherd's Touchstone, 524. 6th Ed. Powell on Powers, 112, 114. *Sayle* v. *Freeland*, 2 Ventr. 350. *Kibbet* v. *Lee*, Hob. 312.

(6) *Thorne* v. *Newman*, cited 3. Ch. Ca. 68. *Bath* v. *Montague*, 3 Ch. Ca. 107.

(g) In *Zouch* v. *Woolston*, 2 Burr. 1147, Lord Mansfield held, that whatever is an equitable, ought to be deemed a legal execution of a power; and the reason is obvious, "for powers were originally in their nature equitable, but by the statute of uses are transferred to common law." See *Earl of Darlington* v. *Pulteney*, 1 Cowp. 266.

(h) "There is a distinction, however, between the non-execution of a power and a defective execution of a power; for though the court will, under certain circumstances, help the latter it will never aid the former, because so to do, would be repugnant to the nature of a power, which always leaves it to the free will and election of the party, to whom the power is given, to execute it or not; for which reason equity will not compel the execution of a power, or construe the act as done, when there is no evidence of the intention of

supply a defect in a conveyance; for it is a pro tanto part of the old dominion (7): as, 1st, Where there is a consideration, either valuable or foreign; as for payment of debts, or provision for children (8), and no better on the other side (*i*). 2dly, Where

(7) *Bath* and *Montague's* case, 3 Ch. Ca. 86. *E. of Coventry's* case, Francis's Maxims, 18. Gilb. Rep. 160. 2 P. Wms. 222. 1 Str. 596.

(8) *Smith* v. *Ashton*, 1 Ch. Ca. 264. *Bath* and *Montague's* case, per Treby, 3 Ch. Ca. 89. *Pollard* v. *Grenvil*, 1 Ch. Ca. 10. *Tollett* v. *Tollett*, 2 P. Wms. 490. Cotton Layer, 2 P. Wms. 622. *Harvey* v. *Harvey*, 1 Atk. 563. *E. of Darlington* v. *Pultney*, Cowp. 260. *Sneed* v. *Sneed*, Amb. 64. *Wade* v. *Paget*, 1 Bro. Rep. 363.

the party to do it." *Tollett* v. *Tollett*, 2 P. Wms. 490. See also Powell on Powers, 157. *Holmes* v. *Coghill*, 7 Ves. 499, 12 Ves. 206; *Crossling* v. *Crossling*, 2 Cox's R. 396. The declaration of such intent is, however, a sufficient ground for the interference of a court of equity, *Arundel* v. *Philpot*, 2 Vern. 69. A covenant in a marriage settlement, referring to a power, or to the estate to which the power attaches, is, in respect of the consideration, a sufficient indication of an intent to execute such power; *Fothergill* v. *Fothergill*, 2 Freem. 256. *Clifford* v. *Burlington*, 2 Vern. 379. *Hollingshead* v. *Hollingshead*, cited 2 P. Wms. 229. See also *Coventry* v. *Coventry*, 2 P. Wms. 222, and Francis's Maxims, *Alford* v. *Alford*, there cited, and *Sarth* v. *Blanfry*, Gilb. Rep. 166. *Vernon* v. *Vernon*, Amb. 3. As to distinction between trusts and power, see *Brown* v. *Higgs*, 5 Ves. 498; but see *Crossling* v. *Crossling*, 2 Cox's R. 396.

(*i*) I have already had occasion to refer to the cases in which courts of equity will supply any defect in the surrender of a copyhold estate; and as their interference, in cases of a defective execution of a power, proceeds

there is any fraud, or the party is guilty of any deceit or falsehood, by which the execution is prevented; for he in the remainder shall not take advantage of his own wrong (9). 3dly, Accident or an impossibility of complying with the circumstances, since it would be unconscionable in the remainder-man to take advantage of these, provided he does all he can (*k*). And so in

(9) *Bath* and *Montague*'s case, 3 Ch. 89. 108. 122. 93.

upon the same principle, it seems to follow, that it is bounded by the same considerations. That a defective execution by a wife, of a power in favour of her husband, shall not be supplied, see *Moodie* v. *Reid*, 1 Mad. Rep. 516.

(*k*) In Bath and Montague's case, 3 Ch. Ca. 69, 93, it is said by the two chief justices, that if the party appear to have intended to execute his power, and is prevented by death, equity shall interpose to effectuate his intent, for it is an impediment by the act of God; and the case of *Smith* v. *Ashton*, 1 Ch. Ca. 264. Finch's Rep. 273; is relied on as an authority to such effect; but this not being an original opinion of the learned chief justices, but being founded on the case cited, it can be carried no farther than that case warrants; and upon reference to the circumstances of that case, it will be found to afford an authority rather against than in support of the notion that where a man is only preparing to execute a power, and dies before he does execute it, the preparatory steps amount to such an execution as equity will make effectual; for it is observable that the court, in *Smith* v. *Ashton*, directed an issue

other cases of powers; as to make leases(10), equity will relieve the defective execution of them (*l*), where there is any fraud or accident, or a valuable consideration (*m*).

(10) *Pollard* v. *Lord Grenvil*, 1 Ch. Rep. 98. 1 Ch. Ca. 10. *Rattle* v. *Popham*, 2 Str. 992, reversed by Lord Talbot C. See 2 Burr. 1147.

to try whether the notes or instructions for the will, from which the intent of the donee of the power was inferred, were part of his will; which issue would have been unnecessary, if the court could have relieved upon the foot of preparatory measures only. The relief afforded in that case must therefore be referred to the result of the issue; which was, that the notes or instructions were part of the will. See *Coventry* v. *Coventry*, Francis's Maxims, p. 16. See also *Cole* v. *Wade*, 16 Ves. 45.

(*l*) This must be understood of such leases as are not derived under powers limited in their nature to a particular mode of execution; for, in the construction of powers originally in their nature legal, courts of equity must follow the law, be the consideration ever so meritorious: for, instance, powers by tenant in tail to make leases under the statute, if not executed in the requisite form, no consideration, however meritorious, will avail. So with respect to powers, under the civil list act, powers under particular family entails, as the case of the *Duke of Bolton*, &c. equity can no more relieve from them than it can from defects in a common recovery. The principle upon which the rule of construction is founded in these cases, is that there is nothing to affect the conscience of the remainder-man; per *Lord Mansfield, Earl of Darlington* v. *Pulteney*, Cowp. 267.

But there is a great difference between a defective execution of a power, and where the power was not executed at all (11); especially if the power be general, it is not such a lien upon the lands as should affect a purchaser, though it had been afterwards executed (12.) Nor has the court gone so far as where a man has a power to raise, if he neglect to execute that power, to do it for him (*n*), although it might be reason-

(11) *Tollett* v. *Tollett*, 2 P. Wms. 490.

(12) *Elliott* v. *Hele*, 2 Vern. 406. 2 Ch. Ca, 29. 87.

(*m*) In the case of defective executions of powers, it is not necessary, in order to induce the interference of a court of equity, that the consideration should be strictly valuable; but it is sufficient that it be meritorious, that is, founded on some moral obligation. But, if there be no consideration, equity will not interpose; *M'Adam* v. *Logan*, 3 Bro. Ch. Rep. 310.

(*n*) As to what shall be deemed the execution of a power of appointment by will, the rule is laid down in Sir *Edward Clare*'s Case, 6 Rep. 17; that where one has a power to appoint by will, and makes a will, but without any reference to the power, the appointment shall have no effect unless the will would otherwise have no operation; see also *Buckland* v. *Barton*, 2 H. Bla. Rep. 139. But though equity will not, even in favour of creditors, execute a power which the party himself has omitted to execute, though the limitation over be to his next of kin, *Harrington* v. *Harte*, 1 Cox's R. 131. Yet if a general power be executed in favour of a volunteer, though a child, it seems agreed by all the cases, that the money shall be assets for the benefit of credi-

able enough, and agreeable to equity in favour of creditors (13).

(13) *Lassels* v. *Lord Cornwallis*, 2 Vern. 465.

tors; *Thomson* v. *Towne*, 2 Vern. 319. *Hinton* v. *Toye*, 1 Atk. 465. Lord *Townsend* v. *Wyndham*, 2 Ves. 1. *Pack* v. *Bathurst*, 3 Atk. 269. *Troughton* v. *Troughton*, 3 Atk. 656. Nor can a power be so framed as to protect an appointment under it from payment of the debts of the appointee. *Alexander* v. *Alexander*, 2 Ves. 640. Powell on Powers, 372.

SECTION XXVI.

And it often falls out, that even not to keep one's promise shall be just; for all must be referred to the fundamental rules of justice (1): as, 1st, That no man be wronged; and 2dly, That the public good be as far as possible promoted. Hence, if the agreement is extremely unreasonable and iniquitous, equity will not carry it into execution (*o*); as where the daughter and

(1) Puff. B 3 c. 5. s. 9. Cicero de Offiiis, lib. 1. c. 10.

(*o*) It is a maxim in equity, that he who hath committed iniquity shall not have equity; Francis's Maxims, max. 2. It is therefore necessary that agreements, to be enforced in equity, should be consistent with the

her husband would have more than the father intended, and would have left the mother and two daughters unpreferred (2). But although a written agreement, being unreasonable, the court will not carry it into execution; yet they will decree, that it be delivered to the person for whose benefit it was designed (3), that he may have an opportunity to make the most of it at a trial at law (*p*).

(2) *Anon.* 2 Ch. Ca. 17.

(3) *Squire* v. *Baker*, 27 Feb. 1726. 5 Vin. Ab. 549. pl. 12. Grounds and Rud. of Law and Equity, pl. 76.

principles of equal justice and good conscience. See *Buxton* v. *Lister*, 2 Atk. 386. *Young* v. *Clerk*, Pre. Ch. 538. *Philips* v. *D. of Bucks*, 1 Vern. 227. *Savage* v. *Taylor*, Forrest. 234. *Shirley* v. *Stratton*, 1 Bro. Rep. 440. *Barnardiston* v. *Lingood*, Barnard. 341.

(*p*) Where a demand is founded on a forged or grossly fraudulent instrument, courts of equity will direct the instrument to be deposited with one of its officers; and that the party claiming under it brings his action within a limited time, or on failure, that the instrument be cancelled; *Bishop of Winchester* v. *Fournier*, 2 Ves. 445.

SECTION XXVII.

Lastly, THE court will not encourage the laches and indolence of the parties, but will presume (*q*), after great length of time Cro. lib. c. 2. 5.

(*q*) The numberless inconveniences which would arise from persons being allowed to contest or set up demands at any distance of time, have induced the legislature to prescribe the time within which certain rights must be pursued; and in such instances length of time operates as a bar; but there are many cases to which the provisions of the legislature do not extend, but to which the principle of such provisions strongly applies. *Shipbrooke* v. *Hinchinbrooke*, 13 Ves. 396. *Ex parte Dewdney*, 15 Ves. 496, 17 Ves. 96. *Hillary* v. *Waller*, 12 Ves. 261. In such cases length of time is not allowed to operate as a bar, but merely as furnishing evidence, either of the right having been conferred, or the demand having been satisfied, though the particular instrument under which the right was derived, or the evidence to shew that the demand was extinguished, be lost. Upon this ground courts of law have thought that a jury ought to presume any thing to support a length of possession; *Eldridge* v. *Knott*, Cowp. 214. And a grant or charter from the crown, which ought to be matter of record, may, under certain circumstances, be presumed, though within time of legal memory. The *Mayor of Kingston, &c.* v. *Horner*, Cowp. 102. So may an actual ouster, of a tenant in common be presumed from the adverse possession of his companion, for any considerable length of time, as forty years; *Fisher* v. *Prosser*, Cowp. 217. And as courts of law will leave it to the jury to presume, from length of time, the means

some composition or release to have been made (1); since it would be too hard to

(1) *Southcote* v. *Southcote*, 1 Ch. Rep. 58. *Bonnington* v. *Walthall*, 2 Ch. Rep. 114. *Sherman* v. *Sherman*, 2 Vern. 276. *Bridges* v. *Mitchell*, Gilb. Rep. 224. *Western* v. *Cartwright*, Sel. Ca. Ch. 34. *Sturt* v. *Mellish*, 2 Atk. 610. *Comber*'s case, 1 P. Wms. 766. *Macdowell* v. *Halfpenny*, 2 Vern. 484.

by which a right can be supported, so will they, under certain circumstances, leave it to the jury to presume, from length of time, the extinguishment of a right; as where interest has not been paid on a bond for 20 years or even for 18 years, a jury may presume the bond to be satisfied. See *Rex* v. *Stephens*, 1 Burr. 433. But though courts of law will consider length of time, matter of evidence from which a jury may draw their inferences, either in support or in destruction of a right; yet courts of equity have in some cases found it necessary to interpose; *Powell* v. *Godsall*, Rep. Temp. Finch, 77; originally, perhaps, from courts of law not giving to length of time, where it did not operate as a bar, the weight to which they now conceive it to be entitled. Where a person has been in possession for a great length of time without interruption, equity will presume to supply all those circumstances, or formal ceremonies, which the law deems necessary to the operation of the original conveyance; as livery, surrender, &c. *Knight* v. *Adamson*, 2 Freem. 106, and will not allow such possession to be disturbed; *Lyford* v. *Coward*, 1 Vern. 195. Or where a common has been inclosed for thirty years, equity will presume the inclosure to have been with the consent of all persons interested, and will not allow it to be thrown open; *Silway* v. *Compton*, 1 Vern. 32. So where rent has been paid for twenty years, equity will presume a grant; *Steward* v. *Bridger*, 2 Vern. 516. Where a legatee has been abroad for many years, his death may be presumed; *Dixon* v. *Dixon*, 3 Bro. 516. *Bailey* v.

force a man to keep his evidence by him for ever; and therefore a legacy shall be presumed to be paid after great length of

Hammond, 7 Ves. 590. Equity will also presume an agreement to be abandoned or discharged, if not insisted on during any length of time; *Powell* v. *Hankey*, 2 P. Wms. 82; *Orby* v. *Trigg*, 9 Mod. 2. See *Hervy* v. *Dindwoody*, 4 Bro. Rep. 257; in which the principle and authorities upon the subject are very fully considered.

But though courts of equity will interpose, in order to prevent those mischiefs which would probably result from persons being allowed, at any distance of time, to disturb the possession of another, or to bring forward stale demands; yet, as its interference in such cases proceeds upon principles of conscience, it will not encourage, nor in any manner protect the abuse of confidence, and therefore no length of time shall bar a fraud; *Cotterell* v. *Purchase*, Forrest. 61. *Alden* v. *Gregory*, 2 Eden's R. 280. *Whalley* v. *Whalley*, 1 Merivale, 436; unless it appears that the circumstances of fraud imputed were known to the party, and that with such knowledge he has laid by a considerable time; in which case length of time may be objected, as otherwise the mere imputation of fraud might operate a fraud, as the evidence might be lost by which the imputation might have been repelled; see *Shelly* v. *Brewster*, Rolls. T. 1795; *Weston* v. *Cartwright*, Sel. Ca. Ch. 34. Nor affect a trust; March, 129; *Parker* v. *Ash*, 1 Vern. 256; *Lord Kinsland* v. *Lord Tyrconnel*, 1 Vin. Ab. 186. pl. 10; nor exclude the taxation of an attorney's bill for costs, &c. *Walmsley* v. *Booth*, 2 Atk. 25; *Newman* v. *Payne*, 2 Ves. jun. 202.

time; as where the testator has been dead forty years (*r*). So when a contract has lain dormant many years, there shall be no specific performance (2). But special circumstances may alter the case; as if there are articles upon marriage to purchase lands, and to settle them within three years, these shall not be waved by length of time, if the covenantor has been in trade, and could not conveniently spare money. And although a sleeping mortgage (3) or bond (4) shall be presumed to be discharged, and not subsisting, if nothing appears to the

(2) *Wingfield* v. *Whaley*, 5 Vin. Ab. 534. pl. 38.

(3) *Hales* v. *Hales*, 2 Ch. Rep. pl. 56. (6).

(4) *Coles* v. *Emmerson*, 1 Ch. Rep. 42. *Carpenter* v. *Tucker*, 1 Ch. Rep. 42. *Geoffry* v. *Thorn*, 1 Ch. Rep. 47. 6 Mod. 22. *Humphreys* v. *Humphreys*, 3 P. Wms. 395. *Gratwick* v. *Simpson*, 2 Atk. 144. Wood's Inst. 599.

(*r*) Though length of time will not bar a legacy, because it may have been kept back on account of all the debts not being paid, yet it seems clear that it will raise a presumption of its having been paid: which presumption, unless repelled by evidence of particular circumstances, will be conclusive; *Parker* v. *Ash*, 1 Vern. 256; *Jones* v. *Turberville*, MS. 20 Nov. 1792; *Higgins* v. *Crawford*, 2 Ves. jun. 571. But if the legatee allege that he knew not of his right, it should seem that the presumption could not be raised. See *Ord* v. *Smith*, Sel. Ca. Ch. II. Nor does the case of *Fotherby* v. *Hartridge*, 2 Vern. 21, to which our author probably refers, afford an authority to the contrary; for that case was involved in many circumstances, and it was particularly alleged, that the legatee had received more than the amount of her legacy.

contrary, as by payment of interest, or a demand made, or the like (*s*); yet a will has

(*s*) From the case referred to it appears, that where the mortgagor has been allowed to continue in possession, the mortgage shall, after a length of time, be presumed to have been discharged, unless circumstances can be shewn sufficiently strong to repel such presumption; as payment of interest, or a demand and promise to pay, &c. *Whiting* v. *White*, 2 Cox's R. 290. And as equity will raise this presumption in favour of a mortgagor in possession, a fortiori, ought it to be presumed that the mortgagor has conveyed or deserted his equity of redemption, where the mortgagee appears to have been in possession for a great length of time, twenty years or upwards, no interest having been paid, nor any other circumstance appearing, from which it can be inferred that the mortgage is still subject to redemption? The rule of equity, therefore, is, that the equity of redemption shall be presumed to be deserted by the mortgagor, after twenty years forfeiture, and possession taken by the mortgagee, no interest having been paid in the mean time, unless the mortgagor be capable of producing circumstances to account for his neglect; such as imprisonment, infancy, coverture, or by having been beyond sea, and not having absconded. *Blewett* v. *Thomas*, 2 Ves. jun. 669: *St. John* v. *Turner*, 2 Vern. 418. *Trash* v. *White*, 3 Bro. C. R. 289. I shall have occasion to discuss this subject more particularly in B. 3 c. 1. s. 6, and therefore beg for the present to refer to Mr. Powell's Treatise on Mortgages, p. 135, 136, where the cases are brought together and the distinctions very accurately taken. With respect to demands founded on bonds of an old date, as twenty years, payment will be presumed; *Humphreys* v. *Humphreys*, 3 P. Wms. 396; *Gatwick* v.

been set aside after forty years' possession under it (*t*), and even in prejudice of a purchaser, upon account of the insanity of the devisor (5).

(5) *Squire* v. *Pershall*, Feb. 1726. 8 Vin. Ab. pl. 13.

Simpson, 2 Atk. 144. But this presumption of payment may, like every other mere presumption, be encountered by evidence to repel it; as if interest be proved to have been paid within the time conceived to furnish the presumption; *Lord Barrington* v. *Searle*, 8 Mod. 278. 2 Lord Raym. 1370. 3 Bro. P. C. 535. See also *Turner* v. *Crisp*, cited 2 Str. 827. *Toplis* v. *Baker*, 2 Cox's R. 119. But if no evidence be adduced to repel the presumption of payment arising from the lapse of time, a bond of twenty years old shall be presumed to have been satisfied, though it still remain in the hands of the obligee; Wood's Inst. 599.

(*t*) The case referred to is certainly not reconcileable with *Winchcomb* v. *Hale*, 1 Ch. Rep. 22, in which it was held, that after twenty years and two purchases, it was not proper for the court to examine whether the devisor was non-compos or not; neither is such decision consistent with the rule, that equity will not interpose against a purchaser for valuable consideration, without notice of the objection imputed to his title. As to length of time affecting a trust, see *Townsend* v. *Townsend*, 1 Cox's R. 28. As to a purchaser with notice of a fraud, see *Alden* v. *Gregory*, 2 Eden's R. 280. *Whalley* v. *Whalley*, 1 Meriv. 436, and cases there cited. That merchants, accounts, after six years total discontinuance, are within the statute of limitations, see *Martin* v. *Heathcote*, 2 Eden's Rep. 169. *Welford* v. *Liddel*, 2 Ves. 400. *Barber* v. *Barber*, 18 Ves. 286.

CHAP. V.

What a sufficient Consideration to make an Agreement binding.

SECTION I.

LET us now inquire what shall be deemed a sufficient consideration to make a pact or covenant valid (*a*); for although in do-

(*a*) " A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a nudum pactum, or agreement to pay any thing on one side, without any compensation on the other, is actually void in law, and a man cannot be compelled to perform it; 2 Bla. Com. 445. This definition of nudum pactum raises two questions: first, Whether every verbal agreement, without consideration, is nudum pactum? And secondly, Whether any agreement can, for want of consideration, be nudum pactum, if such agreement be reduced into writing? The civil law is so generally referred to in the discussion of this subject, that it may be material to take a cursory view of the different means by which a legal obligation was created by that law, in order to shew, that, though we have borrowed the phrase nudum pactum from the civil law, and the rule which decides upon the nullity of its effect, yet, that the common law has not in any degree been influenced by the notions of the civil law, in defining what constitutes nudum pactum.

nations and such like contracts where there is no apparent consideration, the bare

By the civil law obligations were created, either ex contractu, aut quasi ex contractu, aut maleficio, aut quasi ex maleficio: obligations induced ex contractu, which are alone necessary to our present investigation, "contrahuntur, aut re, aut verbis, aut literis, aut consensu;" Inst. lib. 3. tit. 14. Obligations re interveniente were contracted by the intervention or delivery of the thing itself by one party to the restitution of which, or of something equivalent in kind, the other party was obliged; Inst. lib. 3. tit. 15. Obligations created by words were termed stipulations; Inst. lib. 3. tit. 16. The agreement or promise was authenticated, confirmed, and ratified, by answers given by the party promising to certain questions; and it derived its force and validity from the solemnity of its form, which was prescribed for the purpose of distinguishing the well-weighed and deliberate promise or agreement from the loose and inconsiderate. The question referred to the nature of the undertaking; as dare spondes? spondeo —facere spondes aut facias?—faciam—promittis? promitto—&c. In no part of the solemnity does the consideration of the promise or agreement appear to have been adverted to, the civil law recognizing the right of a man to bind himself without any consideration, and merely interposing certain forms, in order to guard against surprise, and to evidence the terms and extent of the promise or undertaking. I am aware that the civilians are stated to have held, that every contract implied a reciprocity or exchange, what the Greeks termed *ναλλαγμα*, the civilians, permutatio, 2 Bla. Com. 444. The learned commentator refers to the authority of Gravina in support of this proposition, and has, in a

pleasure of doing good to others stands in the place of a cause on the part of the

note, stated the passage on which he relies; "In omnibus contractibus, sive nominatis, sive innominatis, permutatio continetur." Gravin. lib. 2. s. 12. The passage, however, when examined, will be found materially qualified: it runs thus—"In contractibus, *fere* omnibus, sive," &c. But though Gravina fails Sir Wm. Blackstone, Connanus, a highly respectable authority, appears to furnish considerable strength to his opinion. His reasoning, has, however, been very closely attacked and confuted by Grotius, lib. 2. c. 11. s. 1; and by Vinnius, 596, 4to. ed. who thus expresses his opinion: "Nos vero hoc certo tenebimus substantiam contractus non in eo consistere ut ultro citroque obliget, sed non minus proprie si unus tantum alteri quam si invicem contrahentes inter se ex conventione obligentur, contractam dici obligationem, et negotium ipsum appellari et esse contractum." And in another passage, the same learned civilian observes, "Illud tamen addendum summo adhuc jure ex stipulatione sine causâ nasci actionem sed inefficacem eam reddi oppositâ doli mali exceptione," 611. And, indeed, the reason of introducing the forms of stipulation of itself abundantly proves that the consideration or motive of the agreement was not regarded: "Stipulationis introducendæ ratio hæc una fuit ut discerni posset an promissio temerè effusa an vero consulto concepta esset.—Stipulatio namque eâ formâ modoque concepta non nisi meditatè perficitur et plane distinguitur a nudo pacto a quo sæpe consensus leviter interponitur; quâ ratione quamvis aliàs honestum sit pacta servari ex nudo pacto actionem dari jus civile prohibuit ne homines facile verbis caperentur et ut litium quæ inde exoriri possent

person who receives the benefit, and gives nothing (*b*); yet there is a difference be-

possent occasio tolleretur," Perezii Prælectiones, 2. p. 71. That the object of the forms prescribed was to give to verbal promises a binding and legal force, appears also from Vinnius: "Nimirum leges Romanæ ex nudâ conventione neminem obligari voluerunt ne qualecumque promissum et sermo sæpe inconsultus magis quam a voluntate proficiscens necessitate juris promittentem illigaret et litium quoque, ut opinor, præcidendarum causâ.—Sed excogitata est conventio certo modo et formâ concipienda celebrandaque quam deliberati animi certum signum esse voluerunt et ex quâ certo jure actio competeret quam conventionem stipulationem dixerunt." "Stipulationis vinculo cæteræ quoque conventiones et obligationes firmantur quod videre est tum in pactionibus nudis quæ per se jure civili infirmæ sint ad producendam actionem, stipulatione muniendæ sunt. Vinnius, 611. Whence it appears that verbal promises, which did not take effect by the intervention or delivery of the thing, or, ex consensu, which species of contracts will be presently considered, were nuda pacta ex quibus non oritur actio, until confirmed verbis præscriptis solemnibus, when they became legally binding, and sufficiently strong to sustain any action, whatever might have been the original motive, inducement, or consideration, which led to such verbal act or agreement. The written acknowledgment of a loan or debt was the obligatio literarum; but a written acknowledgment of a debt was not in all cases sufficient to induce a complete or even presumptive obligation. "Sciendum est non cujuslibet chirographi aut cautionis hanc vim esse ut confitentem obliget, sunt enim quædam cautiones et confessiones debiti plane inutiles; quales sunt quæ causam debendi

tween a gift perfected and executed by livery in the life-time of the parties, and a

non continent quas indiscretas vocant, cum scilicet quis confessus est se debere nullâ nominatim expressâ causâ propter quam debeatur.—Cæteræ, quæ certam debendi causam continent, utiles quidam sunt, sed non omnium una est vis idemque effectus.—Etenim harum quædam ad probationem tantum et fidem rei gestæ valent, ad obligationem, nunquam; quædam vim habent obligationis, nunquam probationis solius: ad solam probationem valent confessiones debiti omnes quæ non sunt de pecuniâ mutua," Vinnius, 664. From this passage it appears, that no consideration being stated, might be fatal to even a written acknowledgment; and from the following passage it appears, that where a consideration was stated, it might in all cases be contested within a certain time (two years); and in the case of a loan, the lender might be put upon proving it by the exception de non numeratâ pecuniâ. " Quia tamen iniquum foret ut is qui nihil accepit quasi accepisset, ex cautione teneretur, optimo jure obtinuit, ut de pecuniâ non numeratâ intra certum tempus excipere liceret," Perezii Prælectiones, in lib. 4. ti. 30. Cod. de non numeratâ pecuniâ. But this exception, de non numeratâ pecuniâ, applied only to the case of loans. " Si quis se debere scripserit ex aliâ causâ ut emptionis, locationis, et id genus non utitur exceptione non numeratâ pecuniâ in quibus sive scriptura sit publica (quæ plenam fidem facit) sive privata quâ quis fateatur quidem a se profectam sed neget pecuniam esse numeratam standum est tamen scripturæ donec apertissimis argumentis rem aliter esse gestam probet." " Effectus hujus exceptionis (de non numeratâ pecuniâ) hic est quod rejiciet onus probandi in adversarium ita ut donec pro-

bare promise to give, or a gift imperfect and executory. And even since the statute

baverit numerationem a se factam non cogatur ad solutionem debitor." Perez. ubi. sup. The fourth mode by which an obligation could, by the civil law, be created ex contractu, was ex consensu; which was so called, because nothing was requisite to its perfection but the consent of the parties, " nihil præter consensum habentes hæ obligationes consensuales vocantur:" whereas to other contracts it has been shewn, that the intervention or delivery of the thing, or certain formal words, or a written instrument, were necessary. Of this species of contract were emptio, venditio, locatio, conductio, societas et mandatum, which were nominate contracts. From this view of the different modes by which an obligation could be created by the civil law, it appears, that without any consideration a verbal agreement or promise might, in respect of certain prescribed solemnities, acquire a binding force and legal validity: and further, that for want of a consideration, a written acknowledgment of a debt might be avoided; and that though a consideration was alledged in writing, it might be denied. If then it be asked, What was nudum pactum by the civil law? I should submit, that from the above observations it appears to have been an undertaking to give or to do some particular thing or act, which neque verbis præscriptis solemnibus vestitum sit, neque facto aut datione rei transiit in contractum innominatum. See Erskine's Inst. 456. Grotius, lib. 2. c. 11. s. 1. notâ Gronovii, (1).

Having referred to the different authorities whence the rule of the civil law, respecting nudum pactum may be collected, I shall now proceed to consider whe-

of 3 and 4 Anne, cap. 7, a note is but evidence of a consideration, which it was

ther every verbal agreement, not founded on some consideration, is absolutely void or nudum pactum by the common law. To the validity of some verbal agreements, the civil law required certain solemnities by which they were authenticated and confirmed; but our law having no prescribed forms correspondent or analogous to those solemnities, considers verbal agreements, unless sanctioned or induced by some consideration, express or implied, as absolutely void, or nuda pacta; Plowden, 308. b. Dyer, 336. b. But as a merely naked promise induces a moral obligation on the part of him making it, (see Erskine's Inst. 457.) our law may be said to be defective in not enforcing it. See Doctor and Student, Dial. 2. c. 24. Pothier Traite des Obligations, partie 1. c. 1. s. 1. art. 1. s. 2. Sir Wm. Jones's Law of Bailment, 56, 57. The reason assigned by Plowden, that words are frequently spoken without much consideration, is certainly not conclusive; for, if by a voluntary deliberate promise, an expectation is raised, it seems more favourable to good conscience to enforce the promise, than to disappoint the expectation. Nor do I think the reason assigned by Grotius, lib. 2. c. 11. s. 3. that it is one of the instances in which obligatio sit in nobis et nullum jus in alio, an answer to this objection; for though I agree, that every moral obligation does not confer a legal right, yet where the question is, Whether a moral obligation, founded on an express though verbal promise, ought not in policy to confer a legal right? the rule, Fides servanda seems applicable, which it is not in those instances to which Grotius refers. It is unnecessary to pursue this point further; for whatever objections may be urged against

not before (*c*), and turns the proof on the defendant, the drawer, that there was no

the rule, it seems now to be firmly established, that at law, a consideration of some sort or other is absolutely necessary to the legal validity of a verbal agreement; I shall therefore proceed to consider, Whether an agreement, reduced into writing, can, for want of consideration, be deemed nudum pactum? The question was very much discussed by Mr. Justice Wilmot, in the case of *Pillans* v. *Van Mierop*, 3 Burr. 1670. The learned judge, on that occasion, admitted, that there was no radical defect in a contract for want of consideration, and that the policy of the civil law, in prescribing certain forms, was merely to guard against surprise, and that the agreement being reduced into writing, is a sufficient caution against surprise; but declined giving his opinion, whether an agreement is always good when reduced into writing; see *Rann* v. *Hughes*, 7 Term Rep. 340, in a note. That the civil law did not consider the circumstance of the agreement being reduced into writing equivalent to the verba solemnia, or stipulation, has been already shewn. If, however, an agreement be evidenced by bond or other instrument under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be nudum pactum; Plow. 308. Burr. Rep. 1637. But writings of a less solemn nature, though in some cases sufficient to evidence the intent and agreement of the parties, are not in all cases allowed as conclusive evidence of a sufficient consideration to support

consideration. But the acceptor and indorser of a bill of exchange are bound to

the agreement. Sir Wm. Blackstone observes, that "every bond, from the solemnity of the instrument, and every note, from the subscription of the drawer, carries with it an internal evidence of a good consideration: courts of justice will therefore support them both, as against the contractor himself, but not to the prejudice of creditors or strangers to the contract," 2 Bla. Com. 446. The acknowledged learning and general accuracy of the learned commentator give him a peculiar claim to respect; and I cannot but regret the necessity of occasionally pointing out those errors to which his great and comprehensive work must necessarily be subject; but in the foregoing passage he seems to have laid himself particularly open to observation. He instances a promissory note as an exception to the general rule, which deems contracts without consideration nuda pacta, and refers the exception to the written proof furnished by the note. A promissory note, agreeable to the custom of merchants, is, by 3 and 4 Anne, c. 9, made negotiable at law; and actions may, by the provisions of that statute, be maintained upon it as upon foreign or inland bills of exchange; and the want of consideration certainly cannot be averred by the maker of the note, if the action be brought by an indorsee; but if the action be brought by the payee, or the note be not within the custom of merchants; *Pearson* v. *Garrett*, 4 Mod. 242; the want of consideration is a bar to the plaintiff's recovering upon it; *Jefferies* v. *Austin*, 1 Stra. 674. *Snelling* v. *Briggs*, at Reading, 1741. Bull. Ni. Pri. 274. See also Gilbert's Lex Prætoria, p. 288, 289; and Bayley's Bills of Exchange, 69.

pay without a consideration, because in commerce we are governed by the law of

From this distinction it appears, that the law does not give to promissory notes and bills of exchange the above effect, in respect of the undertaking being evidenced by writing; but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of such securities. If, therefore, the exception to the general rule, which requires a consideration as essential to the legal validity of a contract, be bounded by the reasons which govern the above instances, it will follow, that a consideration is by our law necessary to an agreement, though evidenced by writing, unless the writing, from its being of the highest solemnity, import a consideration, or unless it be negotiable at law, and the interests of third persons are involved in its efficacy. It remains lastly to consider what consideration will be sufficient to sustain an agreement. A consideration, upon which an assumpsit shall be founded, must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiffs; 1 Comyns's Dig. 149. Considerations are either executed or executory: a consideration executed will not support a subsequent promise, unless the act was done at the request of the party promising; Dyer, 272. 1 Roll's Ab. 11. p. 3. 3 Salk. 96. *Lampleigh* v. *Brathwaite*, Hob. 105. *Bosden* v. *Thynn*, Cro. Jac. 18. *Hayes* v. *Warren*, 2 Barnard. 141. *Pillans* v. *Van Mierop*, 3 Burr. 1671; or unless the party promising was under a moral obligation to do the act himself, or to procure it to be done; *Church* v. *Church*, cited in *Hunt* v. *Wotton*, T. Raym. 259. Anon. cited in *Marsh* v. *Rainsford*, 2 Leon. 111. *Turner* v. *Watson*, Tr. 7 Geo. III. Buller, Ni. Pri. 147. *Trueman* v. *Fenton*, Cowp. 544. 2 Bla.

nations, as they are in other countries, and that law is so for the encouragement of

Com. 445. The consideration of the contract must be legal: it must induce a legal obligation. If therefore, the consideration of any agreement be some act which the law prohibits; *Martin* v. *Blithman*, Yelv. 197; or which is against the dictates of morality, or offensive to decency, or prejudicial to the public interests, such agreement will be void: so if the consideration be the forbearance from some act which the law enjoins, or which good conscience dictates, or public policy requires to be done. A consideration is either express or implied: an express consideration is, where the motive or inducement of the parties to the contract is distinctly declared by the terms of the contract; a consideration is implied, where an act is done or a legal demand forborne at the request of another, without an express stipulation; in which case the law presumes an adequate compensation for the act or forbearance to have been the inducement of the one party, and the undertaking of the other. See *Lloyd* v. *Lee*, 1 Stra. 94.

(*b*) The will of the donor will be sufficient to support a gift, as against himself; for in such a case, stet pro ratione voluntas; but as to creditors or purchasers, that reason will not always prevail. See c. 4. s. 12, 13. See also *Jones* v. *Powell*, 1 Eq. Ca. Ab. 84. *Lechmore* v. *E. of Carlisle*, 3 P. Wms. 222. *Lady Cox*'s case, 3 P. Wms. 339. *Cray* v. *Rook*, Forrest. 153.

(*c*) Though before the statute 3 & 4 Anne, c. 9, an action was held not to lie on a promissory note, as within the custom of merchants. *Clark* v. *Martin*, 1

trade (*d*): and the reason of this caution in the law, not to enforce a naked agreement, was not because serious promises do not of themselves bind in the law of nature (*e*), but that the ceremony of solemn forms might put men upon consideration, as also to prevent a multiplicity of suits (1). The court therefore will pay that faith and deference to the solemnity of deeds, and to

(1) Plowd. 308. b. See note (*a*).

Salk. 129. 2 Ld. Raym. 757. *Potter* v. *Pearson*, 2 Lord Raym. 759; yet a note was held to be good evidence of a debt; *Meredith* v. *Chute*, 2 Ld. Raym. 760. The effect of the statute, therefore, is not in making the note evidence of a debt, but in rendering it conclusive evidence between the maker of it, and third persons acquiring it by indorsement, though as between the original parties the consideration is still open to discussion; *Brown* v. *Marsh*, Gilb. Eq. Rep. 154.

(*d*) "The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having, or being supposed to have effects in hand, but for the convenience of trade and commerce, "fides est servanda;" and indeed, "a nudum pactum does not exist in the usage and law of merchants;" *Pillans* v. *Van Mierop*, 3 Burr. 1669, 1670. But see *Brown* v. *Marsh*, Gilb. Eq. Rep. 154. *Hodges* v. *Steward*, 1 Salk. 125.

(*e*) That naked promises do bind the party promising, by the law of nature, see Grotius, lib. 2. c. 11. Puff. B. 3. c. 5. s. 6. Erskine's Inst. 457.

instruments without blemish (2), as to intend them at least the acts of reasonable men, and arising from a good consideration, unless the contrary be proved (*f*): and in the civil law this exception (*g*) was not allowed after two years (3).

(2) *Turner* v. *Binion*, Hard. 200. *Wright* v. *Moor*, 1 Ch. Rep. 84. 1 Eq. Ca. Ab. 84. 2 Bla. Com. 446.

(3) Inst. lib. 3. ti. 22.

(*f*) Though equity will, under certain circumstances, postpone the payment of a voluntary bond or note, &c. yet it will not relieve the party from his obligation, unless he can impeach the transaction for fraud.

(*g*) The exception of which the party was, by the civil law, required to take advantage within two years, was de pecuniâ non numerata; the effect of which was to put the lender on proof of the loan; and unless the exception was taken within the limited time, the loan should be presumed: but such presumption, it seems, might at any distance of time be encountered by evidence, that the money was not advanced. Vide Perezii Prelectiones, in lib. 4, tit. 30. Cod.

SECTION II.

BUT, regularly, equity is remedial only to those who come in upon an actual consideration: so that, although a voluntary conveyance, which is good in law, is sufficient likewise in equity (1), yet a voluntary defective conveyance, which cannot operate at law, is not helped here in favour of a bare volunteer (*h*), where there

(1) *Beard* v. *Nuthall*, 1 Vern. 427. *Wiseman* v. *Roper*, 1 Ch. Rep. 84.

(*h*) It is certainly generally true, that equity will not be remedial or assistant to mere volunteers. *Coleman* v. *Sorrell*, 3 Bro. Rep. 13. *Chitty* v. *Parker*, 2 Ves. jun. 271. But see *Walker* v. *Denne*, 2 Ves. J. 183. *Attorney General* v. *Bowyer*, 2 Ves. J. 170. *Halliday* v. *Hudson*, 3 Ves. 210. *Kennell* v. *Abbott*, 4 Ves. 802. There are, however, some cases, exclusive of those of purchasers, creditors, wife and children, in which it will interpose: as in the case of a resulting trust, *Ackroyd* v. *Smithson*, 1 Bro. Ch. R. 503, which is considered as most correctly stating the doctrine of the Court; see B. 2. c. 5. § 1, where "the volunteer claims under a power, the terms of which, by accident, become impossible to be executed; for a court of equity relieves against all manner of accidents, since it is unconscionable for the remainder-man to take advantage of them: therefore, if a man make a conveyance, with a power of revocation, in the presence of four privy counsellors, and he is sent by the king to Jamaica, where that circumstance becomes im-

is no consideration expressed or implied (2). But there is no doubt, that in the case of a purchaser, the want of a surrender of a copyhold, or the like, shall be supplied (3). And so in case of a creditor (*i*), or provision for payment of debts (4). And there having been precedents already of relief, where it is a provision for children (5), it is best to make the rule uniform, and to stick to a rule; and there ought not to be

(2) *Bonham* v. *Newcomb*, 2 Ventr. 365. *Longdale* v. *Longdale*, 1 Vern. 456. *Pickering* v. *Kealing*, 1 Ch. Rep. 78. 2 Freem. 65. *Greenwood* v. *Greenwood*, Ch. Rep. 272. See c. 1. s. 7.

(3) *Bokenham* v. *Bokenham*, 1 Ch. Ca. 240. *Greenwood* v. *Hare*, 1 Ch. Rep. 144. *Barker* v. *Hill*, 2 Ch. Rep. 113. *Thompson* v. *Atfield*, 2 Ch. Rep. 112. *Taylor* v. *Wheeler*, 2 Vern. 565. *Jennings* v. *Moore*, 2 Vern. 609. *Bradly* v. *Bradly*, 2 Vern. 163. (4) *Drake* v. *Robinson*, 1 P. Wms. 444. *Harris* v. *Ingledew*, 3 P. Wms. 91. *Haslewood* v. *Pope*, 3 P. Wms. 322. (5) *Hardham* v. *Roberts*, 1 Vern. 132. *Smith* v. *Ashton*, 1 Ch. Ca. 263. 2 Freem. 115. *Goodwyn* v. *Goodwyn*, 1 Ves. 226. *Byas* v. *Byas*, 2 Ves. 164. *Tudor* v. *Anson*, 2 Ves. 582. See c. 1. s. 7. note (*s*).

possible, there equity will allow him to revoke without it;" *Bath and Montague*'s case, 3 Ch. Ca. 68. So, where the remainder-man gets the deed into his possession, and will not allow the tenant for life to have a sight of it, there tenant for life may execute conveyances; and though he does not pursue the terms of the power, yet equity will relieve, because the remainder-man shall not take advantage of his own wrong, by withholding from the tenant for life the sight of his power; Gilb. Lex. Prætoria, 306. In what cases equity will marshal assets in favour of volunteers (as legatees) will be considered hereafter. B. 2. c. 2. s. 1.

(*i*) See p. 37, note (*s*), where the circumstances which qualify this general rule are particularly stated, and the leading cases referred to.

one sort of equity for an eldest, and another for a younger son (*k*).

(*k*) It was formerly thought that the principle upon which courts of equity supply the want of a surrender, in the case of children, extended to grandchildren. See *Watts* v. *Bullas*, 1 P. Wms. 60; *Freestone* v. *Rent*, T. 1712, there stated in a note; *Fursaker* v. *Robinson*, Pre. Ch. 475. But this opinion was controverted by Lord Hardwicke, in *Goring* v. *Nash*, 3 Atk. 189, and referred to the mistaken notion, that whatever consideration was sufficient to raise an use at law, was within the principle of this branch of equitable jurisdiction. See also *Tudor* v. *Anson*, 2 Ves. 582. *Perry* v. *Whitehead*, 6 Ves. 544.

SECTION III.

And in equity there must not only be a consideration, as a motive for relief, but it must be a stronger consideration than there is on the other side (*l*); for if it was

(*l*) If, therefore, the agreement be unreasonable, equity will not interpose. See c. 4. s. 26. See also *Stanhope* v. *Topp*, 2 Bro. P. C. 183. 2 Eq. Ca. Ab. 55. note to case 1. Grounds and Rudiments of Law and Equity, p. 18.

only equal, then the balance would incline neither way, but matters must be left in the same situation as they are in at present (1): and therefore where it is said that Chancery will help a defective assurance, if intended as a provision for younger children, this is always to be understood where the heir has some provision made for him (*m*); for the proportion is to be left to the prudence of the father, and equity will then supply the circumstantial part in support of the father's providence for the welfare of his family, which he is by nature bound to take care of (2). But where he is destitute of all provision, there the reason is changed more strongly on the other side, that the court of equity should not interpose to deprive him of the advantage which he has at law (3). And so if one devises his copyhold, being borough English, to his eldest son, and devises houses to his younger son, and the houses are soon after

(1) See c. 4. s. 25. *Robertson* v. *St. John*, Ch. 16 Dec. 1786. MSS. *Lord Compton* v. *Oxendon*, 2 Ves. jun. 261. *Chitty* v. *Parker*, 2 Ves. jun. 271.

(2) *Weeks* v. *Gore*, M. 4. Geo. 1. 6 Vin. Ab. 57. pl. 24. *Cook* v. *Arnham*, 3 P. Wms. 283. Forrest. 55. *Harvey* v. *Harvey*, 1 Atk. 561. *Baker* v. *Jennings*, 2 Freem. 234.

(3) *Hicken* v. *Hicken*, M. Vac. 1733. 6 Vin. Ab. 59. pl. 20.

(*m*) If the heir has such provision, it is not material whence he derives it. *Pike* v. *White*, 3 Bro. Rep. 286. It has already been observed, that the heir, whose claim is to be thus respected, must be one for whom the testator was under as strong a moral obligation to provide, as for the devisee; *Chapman* v. *Gibson*, 3 Bro. Ch. Rep. 229.

burned, and are never entered upon by the younger, the court, as this case is circumstanced, will not supply the want of a surrender (4). And although against a stranger, who comes in with notice, or without a consideration, equity may supply the want of a legal conveyance; yet it never will against him who is a purchaser for a valuable consideration without notice (*n*); for when both are in equal equity, the legal title takes place (5).

(4) *Cooper* v. *Cooper*, 2 Vern. 265.

(5) See c. 4. s. 25.

(*n*) It appears from the decree in *Burgh* v. *Burgh*, Finch's Rep. 28, that a defective conveyance may be supplied in equity in favour of a mortgagee, though the heir of the mortgagor had, between the time of the conveyance and its defects being supplied, confessed divers judgments, which judgments the court held, should not affect the estate to the prejudice of the mortgagee. See p. 38.

SECTION IV.

As to the effect of covenants, therefore, to pass with the lands, when the assignee is a purchaser for a valuable consideration without notice, equity will follow the law; as in case of a lease of a fair or wine licence for years, rendering rent, &c. a purchaser shall not be charged with the rent; because personal things are not in the law intended to reach the assignee (1). So mere collateral covenants, which do not touch or concern the thing demised in any sort, bind only the covenantor, and his executors or administrators (2) who represent him (*o*). But covenants that run with the land, that is, which extend to something in esse, parcel

(1) *James* v. *Blunck.* Hard. 88. *Bp. of Sarum* v. *Hosworthy,* 2 Ch. Rep. 32.

(2) *Spencer's* case, 5 Co. 16. *Bachelor* v. *Gage,* Sir Wm. Jones, 223. Cro. Car. 188.

(*o*) The executors and administrators of the covenantor will be bound by the covenant, though not named, unless the covenant be of such a nature as not to allow of its being performed by any other person but the covenantor. See Dyer, 14. pl. 69. 1 Roll's Ab. 519. l. 35. *Hyde* v. *Dean and Canons of Windsor,* Cro. Eliz. 553. That an executor may dispose of a lease, notwithstanding testator's covenant not to alien, see *Seers* v. *Hind,* 1 Ves. jun. 294.

of the demise, and affect the estate, lie between all those who are privy in tenure or contract, though not named (*p*), like debt for rent at common law; and the reason is, because usually the rent is more or less accordingly, et qui sentit com-

(*p*) All persons to whom the land descended were, by the common law, entitled to the benefit of covenants which run with the land; but grantees of the reversion were not. The stat. 32 H. VIII. c. 34, therefore enacted, That all grantees, &c. of reversions should have the like advantages against the lessees, their executors, &c. by entry for non-payment of the rent, or for doing waste, or other forfeiture; and the same remedy by action only, for not performing other conditions, covenants, or agreements contained in the leases, against the lessees, as the lessors or grantors had. The statute also gives the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. It must not, however, be understood from the general words of the statute, that the grantee of the reversion can take benefit of every forfeiture by force of a condition, Lord Coke conceiving the operation of the statute to be confined to such conditions as are either incident to the reversion, as rent; or for the benefit of the state, as for not doing of waste, for keeping the houses in repair, for making of fences, or such like; and not for the payment of any sum in gross, delivery of corn, wood, or the like. See Co. Litt. 215, where a variety of resolutions upon this statute are stated, and the authorities referred to. See also 6 Vin. Ab. Covenant, (K. 3.) p. 397. *Webb* v. *Russell*, 3 Term Rep. 393. 3 Mod. 338. 1 Wils. 165.

modum sentire debet et onus (3). So a collateral covenant to be done upon the land, as to build de novo, shall bind the assignee (*q*) by express words (*r*), because

(3) *Spencer's* case, 5 Co. 16. b. 5 Co. 24. 1 Roll's Ab. 521. *Tatem* v. *Chaplin*, 2 H. Bla. Rep. 133.

(*q*) This liability of the assignee does not extend to covenants broken before the assignment; as a covenant to build within a certain time, which was past before the assignment; *Grescot* v. *Green*, 1 Salk. 199. *St. Saviour's, Southwark*, v. *Smith*, 3 Burr. 1271. 1 Bla. Rep. 351. Nor is the assignee to be effected by any covenant broken after he has assigned over; *Boulton* v. *Canon*, 1 Freem. 336.

(*r*) In the case put, the assignees are bound by the terms of the covenant, for unless named they would not be bound by law; "for the covenant concerns a thing which was not in esse at the time of the demise made, but to be newly built after, and therefore shall bind the covenantor, his executors, administrators, and not the assignee; for the law will not annex the covenant to a thing which hath no being." *Spencer's* case, 5 Co. 16. b. But as the law would sustain such a covenant against the covenantor and his assigns, if expressly included in the covenant, and give damages for its non-performance, it should seem to follow, that the covenantee would be entitled in equity to a decree for the specific performance of such covenant to build; and of this opinion Lord Hardwicke appears to have been, in the case of *the City of London* v. *Nash*, 2 Atk. 515. 1 Ves. 12. See also *Pym* v. *Blackburne*, 3 Ves. jun. 34. But in the case of *Lucas* v. *Commerford*, 3 Bro. Ch. Rep. 166. Lord Thurlow, C. held, "that there could not be a decree to rebuild

he is to have the benefit of it (4); and a covenant to renew, in consideration of improvements, a purchaser of the inheritance shall make good (5).

(4) Moor, 159. *Spencer's* case, 16. b.

(5) *Richardson* v. *Sydenham*, 2 Vern. 447. *Tanner* v. *Florence*, 1 Ch. Ca. 259. *Finch* v. *E. of Salisbury*, 1 Eq. Ca. Ab. 47.

in pursuance of a covenant, for that he could no more undertake the conduct of a rebuilding than of a repair." See also *Virgin* v. *Mosely*, 3 Ves. 184. *Bracebridge* v. *Buckley*, E. 2 Price's Rep. 200. *Serjison* v. *Hicks*, T. 1805. *Parteriche* v. *Powlett*, 2 Atk. 383. *Rayner* v. *Stone*, 2 Eden's Rep. 128. But see *Sanders* v. *Pope*, 12 Ves. 282.

SECTION V.

But in case of covenants that run with the land, if the circumstances are hard, equity will not decree them in specie, even against those who are bound by them at law; and therefore, although it is the mortgagee's own folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, and not to make a derivative lease of all the term, but a month, or a week, or a day, as

he might have done (*s*); yet where he is only a mortgagee who never was in possession (*t*), the Chancery will not assist to charge him, but leave the lessor to recover at law as well as he can (1). But if the lessor recovers at law (*u*), the rent reserved

(1) *Sparkes* v. *Smith*, 2 Vern. 275.

(*s*) Though a derivative lessee or under-tenant is liable to be distrained for rent during his possession he is not liable to be sued on the covenants of the lease, there being no privity of contract between him and the lessor; *Holford* v. *Hatch*, Dougl. Rep. 174. See note (*d*).

(*t*) It might be inferred, from the report of *Sparkes* v. *Smith*, 2 Vern. 275, that a mortgagee of a lease was, before he took possession, liable at law to the covenants of the lease. It was, however, settled in the case of *Eaton* v. *Jaques*, Doug. Rep. 438, that if a term be assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, &c. of the mortgagor, even after the mortgage had been forfeited, unless the mortgagee has taken actual possession; but it is not necessary that a lessee for lives or years should have taken actual possession, in order to entitle the lessor to his action for rent; for in such case the rent is due by the contract, and not in respect of the occupation, which it is in the case of a tenancy at will; *Bellasis* v. *Burbrick*, 1 Salk. 209. See also 1 Ventr. 41. 1 Sid. 423.

(*u*) In *Eaton* v. *Jaques*, Lord Mansfield observed, that the case referred to, *Pilkington* v. *Shaller*, was not to be supported; for the court refused to relieve the

on the lease, against one as assignee, who had never entered, equity will not deprive him of this advantage at law (2); and in some cases equity will give the lessor a remedy where he had none at law; as if lessee for years makes an under-lease in trust for J. S., the lessor may compel J. S., in equity, to repair (x): but this is only where the executors of the first lessee are insolvent; for though the privity of estate is destroyed in law, yet he shall not have recourse to this remedy, whilst he has any left against the executors of the first lessee (3).

(2) *Pilkington* v. *Shaller*, 2 Vern. 374.

(3) *Goddard* v. *Keate*, 1 Vern. 17.

mortgagee, because it was his own fault to take an assignment of the whole term, and not an under-lease; but that is a very common ground of relief in equity." His Lordship, however, did not mention any case in which equity had relieved upon such ground.

(x) In the case of *the City of London* v. *Nash*, 3 Atk. 515, Lord Hardwicke held, that the court would not enforce a covenant to repair; the rule laid down in *Goddart* v. *Keate*, must therefore be referred to, the lessor having no legal, or at least effective means to enforce the covenant at law; the tenant in possession not being bound by it, he being an under-tenant, and the lessee being insolvent.

SECTION VI.

So in case of a fraud, equity will extend their relief in favour of the lessor; and therefore, although regularly this court will only decree an assignee of a lease to pay the rent become due since the assignment, and which shall become due while he continues in possession, but not during the continuance of the lease (1); for he may, if he can, get rid of the lease by assigning it to another (*y*); yet there is this difference

(1) *City of London* v *Richmond*, 2 Vern. 421. Pre. Ch. 156. *Treacle* v. *Coke*, 1 Vern. 165.

(*y*) At law the assignee is liable only for the rent actually incurred, or covenants broken during his possession, *Boulton* v. *Canon*, 1 Freem. 336. If, therefore, he assigns the very day before the rent becomes due, the lessor cannot maintain his action for it; *Tovey* v. *Pitcher*, Carth. 177. 4 Mod. 71. 3 Co. 22. 1 Salk. 81. 1 Freem. 326. Nor will the circumstance of such assignment being per fraudem, as to a beggar, alter the case; *Lereux* v. *Nash*, Stra. 1221. Buller's Ni. Pri. 159. *Taylor* v. *Shum*, Bosanquet's Rep. C. P. 21. But see *Knight* v. *Freeman*, 1 Vent. 329. 331. T. Raym. 303. T. Jones, 109. in which the validity of such assignment was denied. But whatever may be the rule of law upon this point, it seems to be now settled, that courts of equity will compel an assignee of a term to account for the rent the whole time he enjoyed the

taken, if the assignees have continued long in possession, and the premises are worsted,

land; *Treacle* v. *Coke*, 1 Vern. 165. Whether equity will, in order to secure the future rents under any circumstances, restrain an assignee from assigning to a beggar or insolvent person, was considered, but not determined, in the case of *Philpot* v. *Hoare*, 2 Atk. 319. If the assignee offer to give up the possession to the lessor on reasonable terms, and the lessor refuse to accept such surrender, it were clearly too much for a court of equity, in restriction of a legal right, to prevent the assignment; *Vaillant* v. *Dodomede*, 2 Atk. 546. But supposing the lessor to be willing to accept of a surrender of the term, and the assignee wantonly to insist on his legal right, to assign, when and to whom he pleased, it seems that, under certain circumstances, a court of conscience might without impropriety interpose, to prevent the abuse of such right; and this Lord Hardwicke appears to admit, in *Vaillant* v. *Dodomede*; for having stated the legal right and the propriety of courts of equity in general, following the rule of law, he observes, "but it is true in some sorts of assignments, made by tenants, the court has interposed;" nor does the difficulty reported to have occurred to Lord Hardwicke in *Philpot* v. *Hoare*, appear upon examination to have been entitled to much effect. His lordship is reported to have said, "As to the accruing rents, it is a point of more difficulty; for the covenant in this lease not to assign, does not run with the land to the assignee, because assignees are not bound by name in the covenant." Whence it might be inferred, that if assigns had been expressly included in the covenant, his Lordship would have considered them bound by the covenant. But

and become ruinous under their hands, or by their means, there the assignment to a beggar would be considered to be a fraud to get rid of the damage, which they ought to answer. But if they assign immediately after their coming into possession, there

whether assignees be bound or not by a covenant, does not (except in the case of a collateral covenant to be done upon the land) depend upon their being named in the covenant; for if the covenant run with the land, assignees are bound, whether named or not; and if the covenant do not run with the land, but is a personal contract, or respect something to be done, purely collateral to, and not on the land, they are not bound, though they be expressly named. See *Spencer*'s case, 5 Co. 16. b. 17. a. Therefore, whether the assignee was named or not, was immaterial to the question, Whether the assignee was bound by the covenant not to assign without consent of the lessor? Nor does it strike me as having been necessary, in order to determine whether a court of equity should restrain an assignment to a beggar, previously to determine, whether the assignee was bound by the covenant not to assign; for supposing the assignee to be bound at law by the covenant, equity may restrain the wanton and fraudulent breach of a covenant; and supposing him not to be bound, yet he may be affected in conscience, upon the same principle, that the assignee of a merely personal covenant may be affected in conscience, though not bound at law. See *City of London* v. *Richmond*, 2 Vern. 421. As to assignees of bankrupts, see 49 G. 3. c. 121. s. 19. *Doe* v. *Bevan*, 2 Rose's Bankrupt Cases, 456.

is no ground to relieve (*z*), because the assignee was not chargeable at law, and the lessor had his original security against the lessee and his executors unimpeached (2). But where a man makes a lease rendering rent, if the lessee assigns to a beggar or insolvent person, in equity the lessee shall be bound to pay the rent, which is a common case (3); and even at law the first lessee, by his express contract, may be charged in debt (*a*) for rent after assignment (4). And for the same reason it is, that in debt for rent upon

(2) Gilbert's Lex Prætoria, 296.

(3) *Goddart* v. *Keate*, 1 Vern. 87, 88.

(4) *Walker's* case, 3 Co. 22. *Overton* v. *Sydall*, Poph. 120.

(*z*) This difference is stated by Lord Chief Baron Gilbert, in his Lex Prætoria; but the cases upon which it is founded are not referred to.

(*a*) Provided the lessor has not accepted the assignee for his tenant; for after the lessor has accepted the assignee, he cannot maintain debt against the lessee, though if the covenant be express, he may maintain an action of covenant; *Thursby* v. *Plant*, 1 Sid. 402. 447. 1. Sand. 237. *March* v. *Brace*, Cro. Jac. 334. *Bachelor* v. *Gage*, Cro. Car. 188. *Boulton* v. *Canon*, 1 Freem. 336. *Brett* v. *Cumberland*, Cro. Jac. 522. *Barnard* v. *Godscall*, Cro. Jac. 309. *Wadham* v. *Marlow*, MSS. B.R. 16 Nov. 1784. But if the covenant be merely implied by law, his acceptance of the assignee for his tenant leaves him without remedy against the lessee. See 1 Sid. 447. *Brett* v. *Cumberland*, Cro. Jac. 523.

a lease for years, the plaintiff need not set forth any entry or occupation: as upon a lease or contract, and not by the occupation, as in the other case (5).

(5) *Bellasis* v. *Burbick*, 1 Salk. 209. 1 Vent. 41. See sec. 6, note (*b*).

SECTION VII.

But there is a difference between covenants, advowsons, common, and the like, annexed to the possession of the land, and which pass with the land, and an use (*b*)

(*b*) The distinction here referred to is thus stated in *Chudleigh*'s case, 1 Co. 121. "An use is a trust or confidence which is not issuing out of land, but is a thing collateral annexed is privity to the estate, and to the person, touching the land, scil; that cestuy que use shall take the profits, and that the tertenant shall make estates according to his direction: so that he who hath an use, hath neque jus in re neque ad rem, but only a confidence and trust, for which he hath no remedy by the common law; but his remedy was only by subpœna in Chancery. If the feoffees would not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it; and there-

or warranty (*c*), or such like things, annexed to the estate of the land in privity:

fore the case of an use is not like unto commons, rents, conditions, &c. which are hereditaments in judgment of law, and which cannot be taken away or discontinued by the alienation of the tertenant, or by disseisin, or by escheat, as uses may." From this it follows, that the feoffee to uses having the legal estate, and the cestuy que use having a mere equitable interest in it, bonâ fide, conveyances by the feoffee would, before the statute of uses, bind the land in the same manner as a trust estate is now discharged of the trust by the trustee conveying it to a purchaser for valuable consideration, and without notice of the trust; for by such conveyance the purchaser acquires an equal equity with that of the cestuy que trust, and having an equal equity, the law must prevail; *Millard*'s case, 2 Freem. 43. But this reason only extending to bonâ fide purchasers of the trust estate, all other persons claiming by or from the feoffee or trustee, will be charged with the use or trust in respect of the privity of estate and confidence, which may be implied either from notice of the use or trust, or from a want of consideration. See Law of Uses, 177. Lord Bacon's Readings on the Statute of Uses, Sander's Law of Uses and Trusts; see also B. 2, c. 1, where this subject will be more fully investigated.

(*c*) A warranty (with reference to land) being a real covenant annexed to the freehold, by which the grantor of an estate, doth, for himself and his heirs, warrant and secure the grantee the estate so granted, (2 Bla. Com. 300. Sheppard's Touchstone, 181), it might be inferred, that the covenant is binding on all persons

for to all uses there must be confidence in the person, and privity of estate either

claiming under the grantor, and that the benefit of it extended to all persons claiming under the grantee. I will therefore briefly state, first, who are bound by a warranty; and, secondly, who may and how take advantage of it.

1st. If the grantor be tenant in fee-simple, and the warranty be express; it will of course bind his heir, if he be expressly named: otherwise not, unless the warranty be implied by law, as in case of exchange and partition, and if the grantee be evicted he will be entitled to a recompense from the heir, when bound, if real assets have descended to him. If the grantor be tenant in tail, the issue, by construction of the statute de donis, will not be barred by the warranty descending, unless they have real assets; but if they have real assets, then, to prevent circuity of action, they will be barred: with respect to a remainder-man, he will be barred by the warranty descending on him, whether he have assets or not. If the grantor be tenant by the curtesy, his warranty, either in the life of his wife, or afterwards, is declared by the statute of Gloucester, 6 Ed. I. c. 3, not to be a bar to the heir, unless assets descend to him from the warrantor; and by 11 H. VIII. c. 20, the warranty of the wife of her husband's estate is declared to be void; as are, by 4 Anne, c. 16. s. 21, the warranty of tenant for life, and all collateral warranties of any ancestor who has not an estate of inheritance in possession. See Co. Litt. 384, and Mr. Butler's Notes, Co. Litt. p. 365. 370. 373; in which the doc-

expressed or implied; and the implied confidence is, where a man comes in with

trine of warranty is considered with great learning and perspicuity.

2dly, "All those that are parties to the warranty, *i. e.* such as are named in the deed regularly, shall take advantage of the warranty; as if one doth warrant land to another, his heirs and assigns; in this case, both the heirs and assigns may take advantage of it, and they both may vouch or rebut, or have a warrantia chartæ, so as they come in privity of estate; for otherwise the heirs and assigns cannot vouch or have a warrantia chartæ, and yet they may in divers cases rebut. But those that are not named, for the most part, shall not take advantage of the warranty; and therefore, if land be warranted to J. S. and not to him and his heirs, or to him and his assigns, or to him, his heirs and assigns; in these cases neither the heir nor the assignee may vouch or have a warrantia chartæ; aud yet, in some cases where it is so, the assignee or tenant of the land may rebut;" Sheppard's Touchstone, 198. "And although no man shall vouch or have a warrantia chartæ, either as party, heir, or assignee, but in privity of estate; yet any that is in of another estate, be it by disseisin, abatement, intrusion, usurpation, or otherwise, shall rebut by force of the warranty, as a thing annexed to the land;" Co. Litt. 385. a. To enumerate the various distinctions which prevail upon the subject of warranty, would lead to a much wider field of discussion than the purpose of this note requires, which is merely to shew, that though warranty be a real covenant, it does not involve all those consequences

notice, or without a consideration (1). And even a special covenant to settle lands binds the conscience only, and not the land (*d*): yet a general covenant will bind as strongly (*e*). And if it appear judicially to the court, that he could not properly per-

(1) Law of Uses, 178, 179. Lord Bacon's Readings on the Statute of Uses. Sheppard's Touchstone, 502.

which are incident to covenants which run with the land, and therefore, does not afford, in all cases, an equally binding, and extensively operating consideration.

(*d*) A covenant to settle or convey particular lands, will not at law create a lien upon the lands; but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration, and without notice of such covenant: *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 282. *Freemoult* v. *Dedire*, 1 P. Wms. 429. *Jackson* v. *Jackson*, 4 Bro. Ch. Rep. 462. *Coventry* v. *Coventry*, best reported at the end of Francis's Maxims; for equity considers that as done, which being distinctly agreed to be done, ought to have been done. Grounds and Rudiments of law and equity, p. 75.

(*e*) A general covenant to settle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the covenantor, and therefore cannot be specifically decreed in equity; *Freemoult* v. *Dedire*, 1 P. Wms. 430. But if the covenantor expressly declare the settlement

form or make election; as if the time or settlement were past and he aged, or the like: the court may apply the general covenant on his particular lands, and chuse for him (2). So where A. on the marriage of his son, covenants for himself, his executors and administrators, (without naming his heirs), within one month after the marriage, to settle lands of 150*l.* per ann. on the son and the issue of the marriage, but dies before any settlement made, the son enters upon the real estate as heir to the father, and settles it for the jointure of a second wife, who has no notice of the articles; the articles shall be a lien on the lands whereof the father was then seised, though no particular lands were mentioned in the articles, unless he had purchased and settled other lands within the time limited by the articles, and which were not settled on the second wife, who came in as a purchaser without notice (3). So if a man covenants or enters into bond to settle land of such a value, or

(2) *Coventry* v. *Coventry*, Francis's Maxims, Stra. 596. 2 P. Wms. 222. Gilb. Rep. 160.

(3) *Roundell* v. *Breary*, 2 Vern. 482.

to be in execution of his power, though the particular lands to be charged be not specified, equity will ascertain them; *Coventry* v. *Coventry*, Francis's Maxims, Gilb. Rep. 160.

an annuity out of land of such a value(*f*), and has no land at the time of the settlement, but afterwards purchases land, that land shall be liable, and that against a voluntary devisee (4).

(*f*) If, in pursuance of such a covenant not specifying any particular lands, the covenantor convey certain lands, which afterwards prove to be of less value than covenanted, equity will not supply the difference of value out of other lands. See *Countess of Downe* v. *Moreton*, 2 Ch. Ca. 69; *Vernon* v. *Vernon*, Amb. 5. But if tenant for life, with power to settle a jointure not exceeding 1,200 *l.* per annum on his marriage, covenant to settle on his intended wife 1,000 *l.* and sends for his steward to be informed of a part of his lands to that value, and settles according to the particular, and the lands so settled afterwards appear to be of the value of only 300 *l.*, equity will decree the issue or remainder-man to make up the 1,000 *l.* per annum by other lands; *Lady Clifford* v. *Burlington*, 2 Vern. 379.

(4) *Took* v. *Hastings*, 2 Vern. 97. But see *Deacon* v. *Smith*, 3 Atk. 323.

SECTION VIII.

AND as a covenant without a consideration is null (1), it is the same thing, if the cause or consideration happen to cease (g);

(1) See s. 1. note (a). Heineccius' Elem. J. N. & J. G. c. 13. s. 353. 361.

(g) If the cause or consideration of an agreement fail, before it be mutually performed, equity will not, in general, decree the performance of such agreement; as if the agreement be to convey the manor and lands in *A.* and the vendor appears to have no title to the manor, or is evicted of the lands, equity will not compel the vendee to complete his purchase; for as a purchaser in equity shall not be compelled to accept even a doubtful title, a fortiori, he shall not be compelled to take a confessedly defective title; Sir *G. Hanger* v. *Eyles*, 21 Vin. Ab. 540. pl. 1. *Hicks* v. *Philips*, Pre. Ch. 575; *Tourville* v. *Nash*, 3 P. Wms. 306; *Stent* v. *Baillis*, 2 P. Wms. 220; see c. 3, s. 9, note (*i*). But if the nature of the consideration involve a contingency which may happen before the agreement is mutually executed, equity will enforce performance of the agreement, though such contingency should so happen; as where the agreement respect an interest determinable on lives, and one or more, or even all of the lives, fall before the purchase-money is paid, equity will, notwithstanding, decree payment of the purchase-money; for the nature of the contract involving such contingency, the terms of it must be supposed to have been governed or influenced by the uncertainty of the time when it might happen; *Cass*

so that in all reciprocal contracts there is a warranty on both sides in equity, though

v. *Rudele*, 2 Vern. 280; *White* v. *Nutt*, 1 P. Wms. 61. *Ex parte Manning*, 2 P. Wms. 410; *Mortimer* v. *Capper*, 1 Bro. Ch. Rep. 156; *Henley* v. *Acton*, 2 Bro. Ch. Rep. 17; *Jackson* v. *Lever*, E. 1792; *Paine* v. *Meller*, 6 Ves. 349. See also c. 2, s. 11, note (*i*). Neither will equity relieve from the performance of an agreement, which, when entered into, was founded on a mutual consideration, though by the death of one of the parties the consideration on his part should fail; as where money was devised to be laid out in land to the use of *B.* in tail, remainder to the use of *C.* in fee; *B.* having no issue, agreed with *C.* to divide the money, and before the agreement was executed, *B.* died, by which *C.* becoming entitled to the whole fund, refused to complete the agreement; but the personal representative of *B.* filing his bill for the performance of the agreement, it was decreed, first, by the Master of the Rolls, and afterwards, upon an appeal, by the Lord Chancellor, upon the ground that the death of *B.* had not rendered the agreement less capable of being executed; *Carter* v. *Carter*, Forrest. 271. So in the case of articles to make partition between joint-tenants, if they amount in equity to a severance of the joint-tenancy, they will be enforced against the survivor; *Hinton* v. *Hinton*, 2 Ves. 634. See also *Brown* v. *Raindle*, 3 Ves. 257. But see *Oakley* v. *Smith*, 1 Eden's Rep. 261.

With respect to the failure of the consideration, after the agreement is executed, there are some cases in which relief may be had at law; as where the premium paid for an insurance may be recovered back,

not at law (*h*). But a difference has been taken between a bargain for a place, where

the risk having never been incurred; see Parke's Insurance, p. 418; or the consideration money for an annuity is void for want of registration; *Shove* v. *Webb*, 1 T. Rep. 732; and there certainly are many other cases in which courts of equity appear to have recognized the failure of the consideration as the subject of relief. These decisions are, however, opposed by others of equal weight and authority: so that it seems extremely difficulty, if not impracticable, to extract from the books what the rule of equity is upon this point. In *Newton* v. *Rouse*, 1 Vern. 460, the court decreed one hundred guineas, part of an apprentice-fee, to be paid back to the father of the apprentice, his master having died within three weeks after the sealing of the articles, though it was expressly provided by the articles, that if the master should die within the year, only sixty pounds should be returned. This decision, the Master of the Rolls (Lord Kenyon) in *Hale* v. *Webb*, 2 Bro. Ch. Rep. 80, observed, "carried the jurisdiction as far as could be;" and if it be a rule of equity, as in many cases it is stated to be, that equity will not alter nor extend the agreement of the parties, the decree seems irreconcileable with such rule. As to *Thurman* v. *Abel*, 2 Vern. 64, the decision is referrible to a different principle. See also *Calland* v. *Troward*, 2 H. Bla. 324.

By an anonymous case, 2 Ch. Ca. 19; Finch, Lord Ch. appears to have relieved from the payment of the purchase-money, the purchaser being evicted, though the vendor had covenanted only for himself and all claiming under him, and the eviction was, by one claiming

the party may be removed at pleasure, and a bargain of land of a defeasible title: yet

by a title paramount the vendor's. To the report of that case, the following notes are annexed: 1st, "If declaration, at the time of the purchase treated on, that there was an agreement to extend against all incumbrances not only special, it could not have been admitted. 2dly, The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared, that the vendor was not to warrant but against himself, and the vendee to pay, because the security was absolute without condition. 3dly, Quære, If this may not be made use of to a general inconvenience, if the vendee, having all the writings and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion?" The objections above stated appear entitled to considerable attention; and it is further observable, that if the express and limited warranty of the vendor can be extended, so as to relieve the vendee from payment of the purchase-money, in respect of an eviction to which the warranty does not extend, it might be inferred that if the purchase-money had been paid, the vendee would be entitled to recover it back; a consequence which would lead to the most serious inconvenience, as every contract, however guarded and bounded in its terms, would be liable to be opened at any distance of time. This consideration, probably, influenced the decision of the case of *Bree* v. *Holbech*, Doug. 655; in which the court of King's Bench held, that an action for money had and received, would not lie to recover back a sum of money paid in consideration of an assignment of a mortgage, which afterwards turned out to be a forgery; the assignor "not having covenanted for the

seeing the king has not disallowed such bargains, as it were to be wished he would,

goodness of the title, but only that neither he nor his testator had encumbered the estate; and it being incumbent on the assignee to look to the goodness of it." This decision is an express authority, that the purchase-money paid cannot be recovered back at law, unless the express covenant for title, &c. be broken; and if it be true, that an action for money had and received will lie in all cases in which a bill in equity could be sustained, (see *Moses* v. *Macfarlane*, 2 Burr. 1005,) it seems to afford this conclusion, that a bill in equity, in such case, could not have been sustained. See *Duckenfield* v. *Whichcott*, 2 Ch. Ca. 204. If the vendor appear to have known of the defect of the title, or of an incumbrance, and to have concealed it, then indeed the purchase-money, or an equivalent to the incumbrance, may be recovered back, either at law or in equity, though the warranty be confined to acts done by the vendor; but the circumstance of a court of equity requiring the vendor in such case to be affected with such fraudulent concealment raises a strong presumption, that, without proof of it, the purchaser could not have been relieved; and in the case of *Harding* v. *Nelthorpe*, Nels. Ch. Rep. 118, such proof was required, and for such purpose an issue was directed, to ascertain whether the vendor did or did not know of the incumbrance which affected the land, but to which his covenant did not extend. See *Thomas* v. *Powell*, 2 Cox's R. 394; but see *Urmstone* v. *Pate*, Nov. 1794, Ch.

It remains to consider, whether the destruction of the thing demised will in equity entitle the lessee to a

they occasioning deceit to the king, &c. the purchaser shall not lose his money (2); (2) *Conyers v. Hammond*, 2 Ch. Ca. 83.

suspension of the rent. In considering this point, it is material to refer to the legal distinction between covenants implied by law, and those obligations which are founded on the express covenant of the party: where the obligation is created by law, if the party is disabled from performing it without any fault in him, and hath no remedy, the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity, because he might have provided against such liability by his contract: and therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or destroyed by the king's enemies, yet the lessee is bound to repair it; Dyer, 33. a. Hob. 40; so if burnt by accident; *Charterfield* v. *Bolton*, Comyns's Rep. 627; *Bullock* v. *Dormer*, 6 T. Rep. 650, 751. Upon this distinction it was resolved, in *Paradine* v. *Jane*, Aleyn's Rep. 26, that a lessee could not be released from his covenant to pay rent, though he had been driven from the premises by the king's enemies; and in *Monk* v. *Cooper*, 2 Ld. Raym. 1477, 2 Stra. 763, the lessee was held liable to the rent reserved, though the premises were burnt down, and the lessee's covenant was to keep the demised premises during the term, except they should happen to be demolished or damaged by fire. The same point was also determined in *Belfour* v. *Weston*, 1 Term. Rep. 310; and in *Ainsley* v. *Rutter*, there cited; and was recognized as law by the Court of King's Bench, in *Doe* v. *Sandham*, 1 Ter.

and therefore what the seller has received, he shall repay (*i*). So if in a sale of goods,

Rep. 710. These authorities, to which others might be added, are sufficient to shew that the law does not discharge the lessee from the payment of rent expressly reserved, though the premises, in respect of the enjoyment of which it be reserved, be destroyed by fire, or demolished by the king's enemies, &c. The lessee being thus without remedy at law, it is next to be considered whether he be relievable in equity.

In *Carter* v. *Cummins*, cited in *Harrison* v. *Lord North*, 1 Ch. Ca. 83; "the lessee of a wharf, which was carried away by an extraordinary flood, instituted a suit in equity, to be relieved against payment of his rent; but the only relief he had was against the penalty of the bond, which was broken for non-payment of the rent, and the defendant ordered to bring only debt for his rent." In *Harrison* v. *Lord North*, the Lord Chancellor, though he expressed his inclination to relieve the plaintiff against the payment of rent for a house, which during the troubles had been used by the parliament as an hospital for soldiers, does not appear to have given any relief. The report merely states, that his Lordship took time to advise, and declared, that if he could, he would relieve the plaintiffs; but in that case it is observable, that the lessee had offered to surrender the lease to the lessor, which the lessor refused. From that period the point seems not to have been discussed in equity, until it occurred in *Brown* v. *Quilter*, Ambler's Rep. 619; and that case going off upon another ground, the point was not then determined. Lord Northington, C. did, however, express himself in terms too distinct to allow of any doubt respecting his opinion upon the

the buyer pays money in part of satisfaction, and afterwards the whole value of the

subject. "The justice of the case," his Lordship observed, "is so clear, that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, that I am much surprised that it should be looked upon as so clear a thing that there should be no defence to such an action at law, and that such a case as this should not be considered as much an eviction, as if it had been an eviction of title; for the destruction of the house is the destruction of the thing. Though this covenant does not extend to oblige the defendant to re-build, yet, when an action is brought for rent after the house is burnt down, there is a good ground in equity for an injunction till the house is rebuilt."

The next case in which this point occurred was, *Steele* v. *Wright*, before Lord Apsley, 1773. The decision is stated, in *Doe* v. *Sandham*, 1 Term Rep. 708, to have been, "that though the landlord is not bound to rebuild, yet the tenant is neither obliged to rebuild, nor to pay rent till the premises are rebuilt." This decision is an express authority in favour of the lessee: and as it admits that the lessor was not bound to rebuild, it seems to furnish a general conclusion: but it may be material to consider, whether such conclusion be reconcileable with principle. I have had occasion to observe, that courts of equity do not assume the right of controlling the rule of law, where the rule of law embraces all the circumstances of the case; but that where any particular case involves circumstances to which the framers of the rule do not appear to have adverted, and which therefore could not be made available in a court

goods is recovered against him at law; the money so paid upon that account becomes

of law, there courts of equity will interpose for the purpose of giving to such circumstances the effect to which they may be equitably entitled." See p. 21.

By the rule of law, it seems to be settled, that a lessee having covenanted to pay rent, shall not be discharged from his covenant, though the premises be destroyed by fire, &c. If a court of equity, without requiring circumstances which the rule of law does not reach, will, in direct opposition to this rule, relieve the lessee, in all cases in which the enjoyment of the demised premises is lost; it must be admitted that equity does in such cases controul the law; but if the case involves some particular circumstances, of which the lessee could not avail himself at law, but which in conscience ought to be respected, its interference does not controul, but proceeds on the ground of the rule of law not being applicable to, or framed to meet such case. If the lessor covenants to rebuild the premises, in the event of their being burnt down, as a court of law could not in an action for rent advert to this covenant, a court of equity might perhaps be induced to restrain the lessor from proceeding in such action, it being against conscience that a man should insist on the benefit of a covenant, which was induced by another covenant, which he refuses or neglects to perform. The decision seems also to break in upon another rule of equity; namely, that when the equity is equal, the law shall prevail. If the premises demised are destroyed by accident, as fire, &c. the loss of the rent must fall either on the lessor or lessee. The law says, the lessee shall sustain the loss, (unless he

money received for the use of him that paid it, and he may recover it in an action at

has guarded against such contingency by a covenant in his lease), that is, that he shall continue to pay the rent, though he can no longer enjoy the premises. To relieve him from this legal liability, it must be contended, that he has a higher equity than the lessor: but how is this proposition to be made out? Is fault imputable to the lessor: if not, why subject him to a loss from which the law protects him, and which the lessee has not, by the terms of the lease, required him to bear? I refrain from pressing the circumstance that, perhaps, some degree of neglect may be imputable to the lessee in most cases of accident, because I conceive the argument merely requires the lessor to have an equal equity, in order to entitle him to the full benefit of his legal right, and this principle and reasoning the court of Exchequer appears to have adopted in *Hare* v. *Groves*, 3 Anstr. 687. *Holtsapple* v. *Baker*, 18 Ves. 119.

(*h*) This conclusion does not appear to be a fair result from the cases. The principles upon which courts of law proceed upon the subject of warranty, so strongly tend to reconcile the claims of convenience with the duties of good faith, that I cannot conceive the means by which they can receive an additional extent, or be in any degree circumscribed, without endangering the interests which they are now so well calculated to preserve. To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is necessary to the intercourse of society. These objects are attained by those rules

law (*k*). So if *A.* sells land to *B.* who afterwards becomes a bankrupt, part of the

of law, which require the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to those points, where attention would have been sufficient to protect him from surprize or imposition, the maxim caveat emptor ought to apply; but even against this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting of good faith, fides servanda is the rule of law, and can scarcely be more effectually enforced in equity than it is at law; see Fulbeck's Parallel, 16; and Pothier des Obligations, par. 1. c. 2. art. 3, where the principle is fully considered and illustrated.

If courts of equity were to break in upon these distinguishing principles, all contracts would be indefinite in the extent of their obligation; but to keep within their boundaries, puts no interest in hazard; for wherever fraud can be imputed, another principle attaches, which, though in some instances more effective in courts of equity, is equally recognized at law, namely, that no man shall take advantage of his own wrong.

(*i*) The case referred to (*Conyers* v. *Hamond*) was in equity; the relief given seems to fall within those principles of public policy upon which the court proceeded in *Law* v. *Law*, Forrest. 140; and *Morris* v. *M'Cullock*,

purchase-money not being paid, in this case there is a natural equity (*l*), that the land should stand charged with so much of

Amb. 432. If so, the decision is not to be referred to the doctrine of implied warranty.

(*k*) In the sale of goods, the law implies the warranty of title; see c. 2. p. 109. note (*x*); for the purchaser cannot have better evidence of title to goods than the possession of the vendor: if therefore that fail, he ought to be relieved, and may be, at law.

In *Blackburn* v. *Gregson*, 1 Bro. Ch. Rep. 424, Lord Camden is stated to have observed that in *Chapman* v. *Tanner*, which is the case referred to, the vendor had a natural equity to a lien on the estate, *he having some of the deeds in his hands*; and the same observation was made on that case by Lord Apsley, in *Fawell* v. *Heelis*, Amb. Rep. 724. But this circumstance does not appear necessary to bear out the decision; for in *Walker* v. *Preswicke*, 2 Ves. 622, Lord Hardwicke, C. stated, "that if a conveyance be made of land, the money not paid, as against vendee, his heir, or any claiming under him as purchaser, with notice of this equity, the land may be resorted to." See also *Pollexfen* v. *Moore*, 3 Atk. 272; which, though stated in *Fawell* v. *Heelis*, to be misreported, is, in *Blackburn* v. *Gregson*, upon reference to Lord Hardwicke's note, admitted to be in substance right. The note is as follows: "I delivered my opinion, that the remainder of the estate purchased was to be liable, by virtue of the equitable lien." See B. 1. c. 3. § 2. note (*e*).

the purchase-money as was not paid, without any special agreement for that purpose (3). So where the husband had bound himself to settle an annuity upon his wife during her widowhood, and she had conveyed her estate to her husband; in both deeds there was a power of revocation, and they were both in the custody of the wife: after the husband's death she conceals the deed by which she conveyed her own estate; and after many years, when the arrears of the annuity would be worth more than her own estate, she sets up the bond; this shall not prevail; for the cause of granting such annuity was not subsisting.

(3) *Chapman v. Tanner*, 1 Vern. 267.

SECTION IX.

In the matter of rents, the law of England is, ex vi termini, more particular and strict; for redditus and reddere is the same as restituere; and these words reddendo inde, or reservando inde, are as much as to say, that the lessee shall pay so much of the issues and profits at such days to the lessor (1); and therefore it is not due or payable before the day (*m*); and if the land be evicted (*n*), or lease determined before, no rent shall be paid (2); for there shall never

(1) Co. Litt. 141, 142. *Harrison* v. *Lord North*, 1 Ch. Ca. 83.

(2) *Clun's* case, 10 Rep. 128. a. Co. Litt. 292. b. *Walker's* case, 3 Rep. 22. *Lord Rockenham* v. *Oxenden*, 1 Salk. 578.

(*m*) The rent is not due till the last minute of the natural day; for if the lessor dies after sunset, and before midnight, the rent shall go to the heir, and not to the executors; Co. Litt. 202 a. per Hale, 2 Sand. 287. *Lord Rockingham* v. *Oxendon*, 1 Salk. 578. But see *E. Stratford* v. *Lord Wentworth*, Pre. Ch. 555; and 11 G. II. c. 19.

(*n*) If an eviction be pleaded in bar to rent, it must be rent grown due after the eviction; *Baunton* v. *Bobbett*, 2 Ventr. 68; the eviction must also be an actual eviction: for a mere entry, or trespass, will be no suspension of the rent; *Bushell* v. *Lechmere*, 1 Ld. Raym. 369. Bull. Ni. Pri. 176, 177. *Hunt* v. *Cope*, Cowp. 242.

be any apportionment in respect of part of the time (*o*), as upon eviction of part of

(*o*) The 11 G. II. c. 19. s. 15, has, in certain cases, altered the law as to the apportioning of rents, in point of time: it being thereby enacted, That if "any tenant for life shall happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any such tenant for life, that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, tenements, and hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively." As to apportionment of taxes between tenant for life and remainder-man, see *Sutton* v. *Chaplin*, 10 Ves. 66; of an annuity, see 12 Ves. 484.

Before this statute, the rent, by the death of a tenant for life, was lost; for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent; *Jenner* v. *Morgan*, 1 P. Wms. 392. But see *Anon.* Bunb. 294. The legislature having, however, by the above statute, interposed in favour of tenants for life, its provisions have, by an

the land (*p*). But although rent-service was not apportionable, any more than rent-

equitable construction, been extended to tenants in tail, where leases are determined by their deaths, *Pagett* v. *Gee*, Amb. Rep. 198. *Vernon* v. *Vernon*, 2 Bro. Ch. Rep. 659.

But though the executor of tenant for life is now entitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean time to be invested in government securities, and the interest and dividends to be applied, as the rents and profits would, in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle of the half-year; *Sharrard* v. *Sharrard*, 3 Atk. 592. *Wilson* v. *Harman*, Amb. Rep. 279. 2 Ves. 672. *Pearly* v. *Smith*, 3 Atk. 260; and the authority of the case on the will of Lord C. J. Holt, 3 Vin. Ab. 18. pl. 3. was denied. But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable; *Edwards* v. *Countess of Warwick*, 2 P. Wms. 176. This distinction, however, may be referred to interest on a mortgage being in fact *due* from *day to day*, and so not properly an apportionment: whereas the dividends accruing from the public funds are made payable on certain days, and therefore not apportionable; and upon the principle of this distinction, the Master of the Rolls decreed an apportionment of maintenance-money, it being for the daily subsistence of the infant; *Hay* v. *Palmer*, 2 P. Wms. 501. See also Mr. Cox's note (1). And the principle extending to a separate maintenance for a feme covert, such apportionment has in such case been allowed at law; *Howell* v. *Hand-*

charge (3), till the statute of quia emptores terrarum, which, being made only for the benefit of the lord, does not extend to rent-charge or seck; yet it seems at common law (4), rent-service might be apportioned by the act of God, or the law (*q*); though by the act of the party it was otherwise. And by the same reason, in conscience, if a man be ignorant that he hath such a rent out of the land, which is ignorantia facti,

(3) 1 Roll's Ab. 234. pl. 2. 4 Ba. Ab. 368. 18 Vin. Ab. 510.

(4) *Hodgins* v *Robson*, 1 Vent. 276.

forth, 2 Bla. Rep. 1016. That equity will not in general apportion dividends, see *Rashleigh* v. *Master*, 3 Bro. Ch. Rep. 99. *Webb* v. *Lord Shaftesbury*, 11 Ves. 361.

As to apportionment of fines paid on renewal of leases by tenant for life, see *Nightingale* v. *Lawson*, 1 Bro. Ch. Rep. 440. *Stone* v. *Theed*, 2 Bro. Ch. Rep. 443; *Adderley* v. *Clavering*, 2 Cox's R. 192. *Lawrence* v. *Maggs*, 1 Eden's R. 453, and the cases there referred to. As to apportionment of charges, see *Rives* v. *Rives*, Pre. Ch. 21. *James* v. *Stailes*, Pre. Ch. 44. *Ballet* v. *Spranger*, Pre. Ch. 62. *Jones* v. *Silby*, Pre. Ch. 288. *White* v. *White*, 4 Ves. 24. *Buckeridge* v. *Ingram*, 2 Ves. jun. 652.

(*p*) In what cases eviction of part of the land is a ground for apportionment, see Co. Litt. 148.

(*q*) Lord Coke concludes, from Littleton, s. 222, not having referred to the stat. quia emptores, that rent-service was apportionable at common law; Co. Litt. 148. a.

or that the law would extinguish his whole rent by a purchase of part of the land, which is ignorantia juris; even a rent-charge (*r*) shall in such case be apportioned (5).

(*r*) Regularly, at law, there can be no apportionment of a rent-charge, because it is an entire thing, 1 Rol. Ab. 234; as if a grantee of a rent-charge purchase part of the land, he cannot bring a writ of annuity; because it was by the grant a rent-charge, and he hath discharged the land of the rent-charge by his own act. But if the rent-charge be determined by the act of God or of the law, yet the grantor may have a writ of annuity, Co. Litt. 148; and if determined by the act of God, it may in some cases be apportioned; as if part of the land, out of which the rent issues, descend on the grantee. 1 Rol. Ab. 236. pl. 5.

(5) *Slater* v. *Buck*, Moseley's Rep. 257. Dr. & Stud. Dia. 2. c. 16.

CHAP. VI.

Of the Execution of the Agreement.

SECTION I.

It remains, in the last place, that we speak of the execution of the agreement: and 1st, That we inquire what ought to be done on the part of him who sues for a performance; for when a man takes upon him any duty, not absolutely gratis, but upon the prospect of the other's doing something on his side, the obligation to make good his undertaking is only conditional (1); and, therefore, in the law of nature, it is a general rule, that the particular heads of a contract are in the place of so many conditions (2); and in conditions all things remain, before they are accomplished, in the same state as if there never had been any covenant (3). So at common law, in executory contracts, pro (*a*) makes a con-

(1) See c. 5. s. 8. note (*a*).

(2) Puff. B. 3. c. 8. s. 8.

(3) 1 Dom. Civ. Law. 45.

(*a*) Pro, in executory contracts, makes a condition; but in contracts executed, as a feoffment, lease, &c. it is the consideration, and doth not amount to a condition. In the case of conditions annexed to contracts

dition precedent (4), except in some special cases; as 1st, where a day is appointed for the performance, and the day is to happen before the thing can be performed on the other side (5). 2dly, Where they are mutual and distinct covenants (*b*), and not

(4) Co. Litt. 204. a. *Cowper* v. *Andrews*, Hob. 41. *Clarke* v. *Gurnell*, 1 Buls. 167.

(5) *Thorpe* v. *Thorpe*, 1 Salk. 171. 1 Raym. 662. 1 Lutw. 245. *Peters* v. *Opie*, 1 Ventr. 177. *Locke* v. *Wright*, 8 Mod. 42. 5 Vin. Ab. 71.

executory, as an annuity pro unà acrâ terræ, or pro decimis, or pro concilio, if the grantee of the acre be evicted, or if the grantee of the tithes be disturbed in his enjoyment, or if the grantee, pro concilio, refuse to give his counsel, the annuity will cease; but if *A.* be enfeoffed for such considerations by which the state of the land is executed, the failure of the consideration, as the eviction of the acre, the disturbance of the tithes, or the denial of counsel, will not avoid the estate. See Co. Litt. 204. Wood's Inst. 231.

(*b*) "The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties; and however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." Per Lord Mansfield, *Jones* v. *Berkley*, Dougl. 665. See also *Hotham* v. the *East India Company*, 1 Term Rep. 638. *Morton* v. *Lamb*, 7 Term Rep. 125.

• Where the participle, doing, performing, paying, repairing, is prefixed to a covenant, it is clearly a mutual covenant, and not a condition precedent; *Boone* v. *Eyre*, 2 Bla. Rep. 1312. *Allen* v. *Babington*, Sid.

one in consideration of the other (6). 3dly, Where the covenant on the plaintiff's part is in the negative, which may be broken at any time during his life (7); for every man's bargain is to be taken as he intended, when he gives credit, and relies upon his remedy, it is reasonable that he should be left to it; but a man shall not be compelled to trust when he never intended it (8).

(6) *Ughtred's* case, 7 Rep. 10. *Clarke* v. *Gurnell*, 1 Buls. 167. *Smith* v. *Shelberry*, 2 Mod. 33. Stile, 186. Hob. 106. *Nichols* v. *Raynbred*, Hob. 88. *Kingston*, v. *Preston*, E. 13 Geo. 3. cited in *Jones* v. *Berkley*, Doug. 664.

(7) *Hunlock* v. *Blacklowe*, 2 Saund. 155. 1 Mod. 64. 1 Sid. 464. (8) *Thorpe* v. *Thorpe*, 1 Lord. Raym. 662.

280. *Atkinson* v. *Morrice*, 12 Mod. 503. But where the covenant goes to the whole consideration on both sides, there it is a consideration precedent; *Duke of St. Albans* v. *Shore*, Bla. T. Rep. 270.

Where the covenants are mutual and distinct, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action for a breach by the defendant; for the damage may be unequal, and therefore each party must recover against the other the damages he sustained; *Cole* v. *Shallett*, 3 Lev. 41. *Thomson* v. *Noel*, 1 Lev. 16. *Howlett* v. *Strickland*, Cowp. 56. But see *Calonel* v. *Briggs*, 1 Salk. 122. *Goodison* v. *Nunn*, 4 Term Rep. 761.

SECTION II.

He, therefore, who demands the execution of an agreement, ought to shew that there has been no default in him (*c*) in performing all that was to be done on his part (1); for, if either he will not, or through his own negligence cannot (2), perform the whole on his side, he has no title in equity (*d*) to the performance of the other

(1) *Calonel* v. *Briggs*, 1 Salk. 112. *Lock* v. *Wright*, 8 Mod. 40. *Powell* v. *Pillett*, Gilb. Rep. 188. *Duchess* v. *Duke of Hamilton*, 28 March, 1727. Grounds and Rud. of Law and Equity, p. 18, c. 4. *Blackwell* v. *Nash*, 1 Str. 535. *Goodison* v. *Nunn*, 4 Term Rep. 761. (2) *Butcher* v. *Hinton*, 1 Ch. Ca. 302. *Keen* v. *Stukely*, Gilb. Rep. 155. *Pope* v. *Roots*, 2 Bro. P. C. 184. *Earl of Feversham* v. *Watson*, Rep. temp. Finch. 445. 2 Freem. 35. *Hatton* v. *Long*, Rep. temp. Finch, 12.

(*c*) Where the plaintiff appears to have taken all proper steps to the performance of his part of the agreement, but has been prevented from the completion of it by the neglect or default of the defendant, his endeavours will, both at law and in equity, be considered as equivalent to performance, Roll's Ab. 455. 457, 458. Litt. s. 335. *Blackwell* v. *Nash*, 1 Str. 535. *Hotham* v. *East India Company*, 1 Term Rep. 638.

(*d*) The plaintiff, in equity, if he has not performed his part of the agreement, must not only shew that he was in no default in not having performed it, but must also allege, that he is still ready to perform it. See *Fildes* v. *Hooker*, 2 Merivale, 424. *Fane* v. *Spencer*,

party, since such performance could not be mutual. And upon this reasoning it is, that where a man has trifled, or shewn a backwardness in performing his part of the contract, equity will not decree a specific performance in his favour (*e*), especially if

ibid. 430, in a note. Whereas, at law, if the covenants be not precedent, but distinct and independent, the plaintiff need not allege nor offer a performance of his covenants to entitle him to recover against the defendant for the breach of his. See s. 1. note (*h*); *Pordage* v. *Cole*, 1 Sand. 320. *Nichols* v. *Raynbred*, Hob. 88. But see *Calonel* v. *Briggs*, 1 Salk. 112. *Goodison* v. *Nunn*, 4 Term Rep. 761.

(*e*) Neither will equity decree an agreement which appears to have been discharged afterwards by parol, though the original agreement was in writing; *Goman* v. *Salisbury*, 1 Vern. 240. *Lord Milton* v. *Edgworth*, 6 Bro. P. C. 580. *Legal* v. *Miller*, 2 Ves. 299. *Inge* v. *Lippingwell*, Dick. 469. *Davis* v. *Symonds*, 1 Cox's R. 406. Nor will equity interpose if the agreement has not been insisted on for many years; *Wingfield* v. *Whaley*, 5 Vin. Ab. 534. pl. 38. 2 Bro. P. C. 447. *Powell* v. *Hankey*, 2 P. Wms. 82; see also *Orby* v. *Trigg*, 9 Mod. 2. *Harrington* v. *Wheeler*, 4 Ves. 686; unless the suspension of it can be accounted for by special circumstances, see c. 4. s. 27. *Marq. of Hertford* v. *Bore*, 5 Ves. 719; but the plaintiff not having performed his part of the agreement precisely at the time stipulated, is not a sufficient ground for a court of equity to refuse its assistance; *Gibson* v. *Paterson*

circumstances (3) are altered. So if a man buys land, or certain shares of a ship, and secures the money, (viz. by giving bond, &c.) if the seller will not make an assurance when reasonably demanded, he shall lose the bargain; for the party ought not to be perpetually bound without having a performance (4). But if a third person should take a conveyance with notice, and without tender and refusal, he would be liable. So where there was an agreement between lord and tenant for inclosing a common, that the tenants should quit their rights of common, and the lord should release them all of quit rents, the inclosure was prevented by pulling down the fences, and the tenants continue to use the common; this is a waver of the agreement (5).

(3) *Hays* v. *Caryll*, Jan. 1702. 5 Vin. Ab. 538. pl. 18. See post, B. 1. c. 6. s. 12.

(4) *Legat* v. *Hockwood*, 2 Ch. Ca. 5.

(5) *Lady Lanesborough* v. *Ockshott*, 2 Bro. P. C. 116. 2 Eq. Ca. Ab. 207. 5 Vin. Ab. 8. pl. 31. 516. pl. 24.

1 Atk. 12. *Pulcke* v. *Curtis*, 4 Bro. C. R. 329. *Lloyd* v. *Collett*, 4 Bro. C. R. 469. See *Omerod* v. *Hardman*, 5 Ves. 736. *Seton* v. *Slade*, 7 Ves. 265. *Hall* v. *Smith*, 14 Ves. 426; unless from the nature and object of the contract compensation cannot be made; *Newman* v. *Rogers*, 4 Bro. Ch. Rep. 391. *Lewis* v. *L. Lechmere*, 10 Mod. 503; for if compensation can be made, courts of equity will dispense not only with the exact performance of the contract, in point of time, but also with circumstances of description or of quantity, if not very material; *Calcraft* v. *Roebuck*, 1 Ves. jun. 221. *Calverty*

v. *Williams*, 1 Ves. jun. 210. *Conolly* v. *Parsons*, 3 Ves. jun. 625. in a note. See also *Guest* v. *Hompay*, 5 Ves. 818. *Drewe* v. *Hanson*, 6 Ves. 675. *Wynn* v. *Morgan*, 7 Ves. 202. *Alley* v. *Deschamps*, 13 Ves. 225. *Hall* v. *Smith*, 14 Ves. 426. *Dyer* v. *Hargrave*, 10 Ves. 507. 1 Madd. R. 163. *Knatchbull* v. *Grueber*, 1 Madd. Rep. 170. *Winch* v. *Winchester*, 1 Ves. & B. 374. But time may be made of the essence of a contract.

SECTION III.

BUT if a man has performed a valuable part of the agreement, and is in no default for not performing the residue (*f*), there it seems but reasonable, that he should have

(*f*) Chief Baron Gilbert distinguishes those cases in which the plaintiff is in statu quo, as to all that part of the agreement which he has performed, from those in which he is not in statu quo, observing, that where he is in statu quo, equity will not enforce the agreement, if the plaintiff cannot completely perform the whole of his part of it. But if the plaintiff has performed so much of it that he cannot be placed in statu quo, equity will, notwithstanding his being incapable of performing the remainder by a subsequent accident, compel the other to perform his part of the agreement. And to this distinction must be referred the difference of decision in the cases of *Earl of Faversham* v. *Watson*, Rep. temp. Finch, 445, and *Meredith* v. *Wynn*, Pre. Ch. 312. See Gilbert's Lex Prætoria, 240, 241.

a specific execution of the other part of the contract (1), or at least that the other side should give back what he has received, or use his best endeavours, that he be not a loser by him. For since he entered upon performance in contemplation of the equivalent he was to have from the person with whom he contracted, there is no reason why this accidental loss should fall upon him more than upon the other (2).

(1) *Meredith* v. *Wynn*, Pre. Ch. 312. Gilb. Rep. 70. *Baskerville* v. *Baskerville*, 2 Vern. 448. See *Tyre* v. *Ball*, MSS. 23 Nov. 1792. Ch.

(2) See Ch. 5. s. 8. n. (*g*).

SECTION IV.

And some say, that in all cases of penalty or forfeiture that lie in compensation (*g*), equity will relieve (1); for where

(1) *Hayward* v. *Angell*, 1. Vern. 222. *Grimstone* v. *Ld. Bauce*, 1 Salk. 156. *Cage* v *Russell*, 2 Vent. 8. 352. *Hack* v. *Leonard*, 9 Mod. 90. 91. 112. *Pope* v. *Sanders*, 12 Ves. 282. as to forfeiture for not making the stipulated repairs; but see contrà, *Hill* v. *Barclay*, 16 & 18 Ves. *Wadman* v. *Calcraft*, 10 Ves. *Bracebridge* v. *Buckly*, Ex. 2 Price's Rep. 200. *White* v. *Warner*, 2 Merivale, 459.

(*g*) But though equity will, in certain cases, relieve against forfeitures, it will not avoid the act which works it at the instance of the party doing the act; *Wentworth* v. *Turner*, 3 Ves. jun. 3. "There are also some forfeitures which do not allow of compensation, as forfeitures which may be considered as limitations of the estate, and which determine it when they happen. Tenant for life making a greater estate than his own, gives up or surrenders the right which he had before,

they can make compensation, no harm is done. So that although an express time be appointed for the performance of a condition, the judge may, after that day is

and yet he does no damage to the remainder-man: so tenant by copy, taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate: the law has made it so; and to relieve against it (unless in case of fraud), would be directly repealing the law." *Sir H. Peachy* v. *D. of Somerset*, 1 Stra. 452. There are also forfeitures which do allow of compensation, but to which this rule of equity has been held not to extend, as where tenant for life of a copyhold commits wilful waste, equity will not relieve; *Thomas* v. *Porter*, 1 Ch. Ca. 96. Pre. Ch. 547. But see *Northcote* v. *Duke*, Amb. Rep. 511; or where a copyholder obstinately or for a length of time refuses to do suit and service, or to repair; *Cox* v. *Higford*, 2 Vern. 664; or grants leases without licence, which might in time be used as evidence of the premises being freehold, or destroys the ancient boundaries of the estate; *Sir H. Peachy* v. *D. of Somerset*, Pre. Ch. 568. But though equity will not in general relieve against forfeitures for wilful waste, it will relieve against forfeitures for permissive waste; Pre. Ch. 574. I have qualified the rule as to wilful waste, relief having been given in the case of *Nash* v. *Lady Derby*, 2 Vern. 537; against a forfeiture incurred by the plaintiff, it appearing that he had applied in repair upon the copyhold the timber which he had felled, and which at law was held to be waste. That courts of equity will not relieve against forfeitures of shares in stock or canal companies, see *Sparkes* v. *Liverpool Waterworks Company*, 13 Ves. 428.

past, allow a reasonable space to the party, making reparation for the damage, if the damage be not very great, nor the substance of the covenant destroyed by it (2). As where the condition is for the payment of money at a certain time; for they may allow interest for it from the day it should have been paid (3), and the forfeiture is a penalty which is a subject matter of relief (*h*). But where it is for the doing a collateral act, they cannot know of what value it is to the party (4). And at law,

(2) *Woodman* v. *Blake*, 2 Vern. 222. *Bertie* v. *Ld. Falkland*, 3 Ch. Ca. 135.

(3) *Barnardiston* v. *Fane*, 2 Vern. 366. *Northcote* v. *Duke*, Ambl. Rep. 511.

(4) *Sweet* v. *Anderson*, 1723, 5 Vin. Ab. 93. pl. 15.

(*h*) "The true ground of relief against penalties is, from the original intent of the case where the penalty is designed only to secure money, and the court gives him all that he expected or desired; as in the case of penalties for non-payment of rents or fines (*Davis* v. *West*, 12 Ves. 475,) which are only by way of security, of the rent or fine; and therefore when these are paid with interest, the money itself is paid according to the intent only as to the circumstance of time; which is the true foundation of equitable relief." See 1 Stra. 453. See also *Sloeman* v. *Walter*, 1 Bro. Rep. 418; see 4 G. II. c. 28, as to forfeiture for non-payment of rent; and as to forfeiture of benefit of renewal of a lease for lives, by non-payment of the renewal fine, see *Bayley* v. *Corporation of Leominster*, 3 Bro. R. 529. *Baynham* v. *Guy's Hospital*, 3 Ves. 295. *Eaton* v. *Lyon*, 3 Ves. 690. *Redshaw* v. *Bedford Level*, 1 Eden's R. 348. As to decisions on the Irish Tenantry Act, 19 & 20 Geo. III. c. 30, see *Jackson* v. *Sanders*, 1 Sch. & Lef. 443. *Truman* v. *Waterford*, 1 Sch. & Lef. in a note, 451. *O'Neil* v. *Jones*, 1 Ridg. P. C. 176. *Keating* v. *Sparrow*, 1 Ball & Beattie, 367.

that which is granted or reserved under a certain form, is never drawn to a valuation or compensation; and he shall make his own grant voint, rather than the certain form of it should be wrested to an equivalent (5). For the law allows every man to part with his own interest, and to qualify his own grant, as he pleases; and therefore will not suffer any satisfaction or recompence to be given in lieu of it, if the thing be not taken as it is granted. So in equity, if a creditor agrees to take a sum of money less than his debt (*i*), if paid at such a

(5) Lord Bacon's Maxims, max. 5. *Woolly* v. *Bp. of Exeter*, Cro. Jac. 691. But see *Collard* v. *Travard*, 2 H. Bla. Rep. 324. House of Lords, 196.

(*i*) But if the condition of a bond or deed be to pay a higher rate of interest, if the debt be not paid on a certain day, equity will consider such condition in the nature of a penalty, and relieve against it; *Lady Holles* v. *Wyse*, 2 Vern. 289. *Shode* v. *Parker*, 2 Vern. 316. *Walmsley* v. *Booth*, Barnard. 481. The decision in the case of *Marq. of Halifax* v. *Higgens*, as reported in 2 Vern. 134, is certainly irreconcileable with these decisions; but it is observable that it was differently cited in *Lady Holles* v. *Wyse*, it being there stated that the interest was reserved at 6 per cent. but if duly paid, the mortgagee agreed to accept of 5 per cent.; and this is probably the most accurate statement; for in *Jory* v. *Cox*, Pre. Ch. 161, it is said that the agreement to take 5 per cent. was by a distinct deed. If, therefore, the first agreement was for 6 per cent. to be reduced to 5*l.* upon condition of punctual payment, the decision falls within the rule of the cases cited in the margin, and cannot affect the above distinction.

day, he cannot be relieved, if the money is not paid (6). So where *A.* seised in fee and having three daughters, devise to trustees to convey to the eldest, if she shall pay 6,000*l.* to her two sisters in six months; and if not, then gives the like pre-emption to the second, and then to the third: the money must be paid punctually to the time, and Chancery will not enlarge (7).

7 Feb. 1705. 5 Vin. Ab. 93.

(6) *Sewell* v. *Musson*, 1 Vern. 211. *Jory* v. *Cox*, Pre. Ch. 160. *Brown* v. *Barkham*, 1 P. Wms. 652. *Nichols* v. *Maynard*, 3 Atk. 519.

(7) *Maston* v. *Willoughby*, pl. 112.

SECTION V.

And we must agree, that men's deeds and wills by which they settle their estates, are the laws that private men are allowed to make, and they are not to be altered even by the king in his courts of law, or conscience. So that in case of conditions subsequent (*k*), that are to defeat an estate,

(*k*) The substantial distinction which governs the interference of courts of equity in cases of conditions broken, is not whether the condition be precedent or subsequent, but whether compensation can or cannot be made. See c. 4. s. 1. note (*c*), and the cases there cited. See also *Hayward* v. *Angell*, 1 Vern. 222. *Bland* v. *Middleton*, 2 Ch. Ca. 1. Francis's Maxims, p. 49. *Wallis* v. *Grimes*, 1 Ch. Ca. 89.

they are not favoured in law; and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited. And though a court of equity may relieve to prevent the devesting an estate; yet it cannot relieve to give an estate that never vested. And if the party himself, who was master of the estate, and might have disposed of it as he pleased, is to be tied down to the terms and circumstances he had imposed upon himself, and those that claim or derive under him; those to whom he gives an estate upon terms and conditions must stand much more obliged to the performance of the conditions and circumstances upon which it is given (*l*); and if the condition becomes impossible, even by the act of God; the estate will never arise (1). But conditions to restrain marriages annexed to legacies stand upon

(1) *Bertie* v. *Ld. Falkland*, 2 Vern. 339. 3 Ch. Ca. 129. 1 Salk. 231. *Popham* v. *Bamfield*, 1 Vern. 83. *Thomas* v. *Howell*, 1 Salk. 170. 4 Mod. 66. *Fry* v. *Porter*, 1 Ch. Ca. 138.

(*l*) Though courts of equity, equally with courts of law, recognize the rule cujus est dare illius est disponere, yet there are some conditions, the breach of which will not induce a forfeiture of the benefit to which they are annexed; as where a legacy is given on condition that the legatee does not dispute the testator's will; if there be causa probabilis litigandi, the legatee having disputed the will, will not be a forfeiture of his legacy. *Powell* v. *Morgan*, 2 Vern. 90.

marriages annexed to legacies stand upon other reasons; because legacies being recoverable properly in the ecclesiastical court, where the civil law obtains, are here (*m*) to be interpreted by the same law, that there may be a conformity in the laws that govern them; and by the civil law, these restraints are odious and not binding; and so by our law, unless there be an express devise over, more than the law implies.

(*m*) See c. 4. s. 10. note (*q*), in which I have attempted to illustrate the principles, and to bring together and class the various cases and distinctions upon which our law proceeds respecting conditions in restraint of marriage.

SECTION VI.

As to the manner in which the agreement is to be carried into execution, it is to be observed, that there are some rules peculiar to certain kinds of agreements relievable only in this court. Others belong more properly to the municipal law. As for the first, contracts are divided into gainful or

chargeable (1). Gainful contracts bring some advantage to one party *gratis*; and therefore in these, the magistrate is obliged to proceed according to the stated forms and rigour of law; for else a man's generosity might prove too great a burthen to him, if he should be bound to do more than he has expressly declared. But chargeable contracts bind both sides to an equal share of the burthen, for here we act, or give, in order to receive an equivalent. So that they may well admit of equity in the interpretation: since the obligation being mutual, neither party ought to be overburthened. And the court of Chancery makes the same difference between voluntary and mutual agreements. And therefore the intent of marriage articles appearing to be a reciprocal contract between them for settling each other's claim, ought not to be extended larger on one side than on the other. But equity will not carry a covenant, being a free gift, beyond the letter (2).

(1) See Grotius, lib. 2. c. 12. s. 2. Puff. b. 5. c. 2. s. 8. where this difference is very fully considered.

(2) *Basse* v. *Grey*, 2 Vern. 692. See b. 1. c. 5. s. 2. note (4).

SECTION VII.

So although limitations of estates, whether it were by way of trust, or by estate executed at the common law, are to be governed by the same rule(1), and the court must take the words as they find them (*n*);

(1) *Watts* v. *Ball*, 1 P. Wms. 108. *Bale* v. *Coleman*, 1 P. Wms. 142. 2 Vern. 670. *Cowper* v. *Cowper*, 2 P. Wms. 376. *Massenburgh* v. *Ash*, 1 Vern. 257. *Atkinson* v. *Hutchinson*, 3 P. Wms. 258. *Bagshaw* v. *Spencer*, 2 Atk. 574. *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 206.

(*n*) In the construction of limitations which include or carry the legal estate, the rule is the same in courts of law and equity. And if the rule of law required the words in which such limitations are framed to be construed in all cases according to their strict legal import, courts of equity could not, without endangering the interests of property, depart from such settled and established rule of construction. But in those cases in which the strict rule of law is allowed to bend to the plain and manifest intent, courts of equity may, without imputation, proceed upon the same liberal principle of construction. That there are rules of law of this flexible nature may be collected from the several authorities referred to by Sir William Blackstone, in his argument upon delivering judgment in the Exchequer chamber, in the case of *Perrin* v. *Blake*. See Mr. Hargrave's Law Tracts, 489. But they are rules, to adopt the expression of that learned authority, of the second

yet where settlements are agreed for upon valuable consideration, this court will aid in artificial words, and make an artificial settlement (2). As in the common case of marriage articles, where they are so penned, as that if a settlement were made in the precise words of them, the husband would be tenant in tail; yet this court will order it to be settled on the husband for life only, and then upon the first and other sons. For articles are only minutes or heads of the agreement of the parties, and therefore ought to be so modelled when they come to be carried into execution, as to make them

(2) *Trevor* v. *Trevor*, 1 Eq. Ca. Ab. 387. 1 P. Wms. 622. 1 Bro. P. C. 122. *Jones* v. *Laughton*, 1 Eq. Ca. Ab. 392, c. 2. *Nandick* v. *Wilkes*, 1 Eq. Ca. Ab. 393. c. 5. *Cusack* v. *Cusack*, 1 Bro. P. C. 470. *Dodd* v. *Dodd*, Amb. Rep. 274.

and third class; for as to those rules which are the great fundamental principles of juridical policy, they possess that degree of sanctity that even the most plain and directly manifest intent is not allowed to weaken, much less to supersede their operation. See c. 3. s. 1. note (*b*). But though courts of equity are, in the construction of such limitations as carry the legal estate, bound to consult with the rules of law, yet in the decreeing the execution of marriage articles, and in the construction of executory trusts, they regard the end and consideration of the settlement and intent of the trusts, beyond the legal operation of the words in which the articles or trusts are expressed. See Mr. Fearne's Essay on Contingent Remainders, p. 124. 4th edit. See s. 8. note (*q*). See also c. 3. s. 11. note (*p*). 190. *Honor* v. *Honor*, 1 P. Williams, 123. *Roberts* v. *Kingsley*, 1 Ves. 238.

effectual according to the intent (*o*). And if the parties come into a court of equity for a specific execution, the court will provide, not only for the sons of that marriage (*p*), by proper limitations, but likewise

(*o*) To secure the end and consideration of the settlement is the motive which induces the interference of courts of equity; but as that object might be equally defeated by allowing the wife to take an estate tail in her own lands, as by allowing the husband to take an estate tail, the articles in such case shall in the same manner be controlled by the end and consideration of the settlement; *Jones* v. *Laughton*, 1 Eq. Ca. Ab. 392. But where the wife takes an estate tail by the articles ex provisione viri, courts of equity will not interpose to settle it otherwise, because in such case the wife, by 11 H. VII. c. 20, is restrained from aliening after the death of her husband, and cannot in his life-time alien without his concurrence; *Honor* v. *Honor*, 1 P. Williams, 123. *Green* v. *Ekins*, 2 Atk. 473, 477. *Whateley* v. *Kempt*, cited in *Howel* v. *Howel*, 2 Ves. 358. And as the power of aliening the estate by the husband and wife jointly is not unreasonable, equity will not controul articles reserving such a power; *Highway* v. *Banner*, 1 Bro. Ch. Rep. 584.

(*p*) Equity will not, in favour of the issue, extend the provisions of the articles, if the articles do make some provision for the issue, though such provision does not affect the whole of the settled estate; for it is not unreasonable for the parents to reserve some power to themselves; *Chambers* v. *Chambers*, 2 Eq.

for the daughters (*q*). And even although a settlement were actually made in pursuance of such articles before marriage, equity will rectify it, in favour of the issue female.

Ca. Ab. 35. c. 4. Fitzgibbon's Rep. 127. *Howell* v. *Howell*, 2 Ves. 358.

(*q*) This must be understood where there is no other provision for the issue female; for if, by the articles, portions are to be raised for the daughters, equity will consider such portions to be the whole extent of the benefit intended them, and will not interpose to give them further benefit; and this seems to be the principal distinction between the case of *Honor* v. *Honor*, 1 P. Wms. 123. *West* v. *Errissey*, 2 P. Wms. 349, and *Powell* v. *Price*, 2 P. Wms. 535.

SECTION VIII.

BUT equity will not interpose in case of a bare volunteer (1). And therefore in a devise (*r*), if the estate is executed, the law

(1) *Bale* v. *Coleman*, 2 Vern. 670. 1 P. Wms. 142. *Longdale* v. *Longdale*, 1 Vern. 456. 2 Ventr. 365. *Colman* v. *Surrel*, 1 Ves. jun. 50.

(*r*) In the case of *Papillon* v. *Voice*, 2 P. Wms. 471, the Master of the Rolls appears to have doubted

must take place; but if executory only (2), the intent and meaning is to be pursued (*s*).

(2) *Leonard* v. *E. of Sussex*, 2 Vern. 526. *Papillon* v. *Voice*, 2 P. Wms. 478. *Glenorchy* v. *Bosville*, Forrest. 3. *Earl of Stamford* v. *Hobart*, 1 Bro. P. C. 288. *Baskerville* v. *Baskerville*, 2 Atk. 281. *Roberts* v. *Dixwell*, 1 Atk. 607. *Gower* v. *Grosvenor*, Barnard. 62.

whether the rule laid down in *Shelley*'s case applies to a devise; but whatever doubt his Honour entertained upon the point, it seems to be done away by the very express decisions cited by Sir William Blackstone, in his argument in *Perrin* v. *Blake*, to which I have already had occasion to refer. See *Whiting* v. *Wilkins*, 1 Bulst. 219; *Rundale* v. *Eley*, Cart. 170. *Broughton* v. *Langley*, 1 Lutw. 814, 2 Ld. Raym. 873. In addition to these authorities, Mr. Fearne has referred to *Pawsey* v. *Lowdall*; *Burchett* v. *Durdant*, 2 Ventr. 311; *Legate* v. *Sewell*, 1 P. Wms. 87; *Goodright* v. *Pullen*, 2 Lord Raym. 1437; *Morris* v. *Le Gay*, cited 2 Burr. 1102, 2 Atk. 249; *Coulson* v. *Coulson*, 2 Stra. 1125, 2 Atk. 247; *Sayer* v. *Masterman*, Ambl. Rep. 344; *King* v. *Burchell*, Ambl. 379; *Wright* v. *Pearson*, Ambl. 358; *Ambrose* v. *Hodgson*, Dougl. Rep. 323. To which authorities many more might be added; they are, however, fully sufficient to the purpose of shewing, that whatever doubt upon this point might have occurred to his Honour in the case of *Papillon* v. *Voice*, it was a doubt which was neither sanctioned by former decisions, and which has not been supported by subsequent.

(*s*) If a series of uniform decisions, by great and learned men, can give conclusive authority to any distinction, the distinction here stated seems to me to be in possession of such claim. It has, however, been remarked, "that in many of the cases on this subject,

As if *A.* devises lands to trustees to pay debts and legacies, and then to settle the

distinctions have been taken and relied upon between legal and equitable estates, and between trusts, executed and executory; and from *Doe* v. *Laming*, 2 Burr. 1108, the opinion of Buller, J. in *Hodgson* v. *Ambrose*, Dougl. 327; and *Jones* v. *Morgan*, Bro. Ch. Rep. 206; it seems that such distinctions no longer exist in courts either of law or equity." That the rule of construction of limitations including or carrying the legal estate, whether an immediate devise or a trust executed, is the same both at law and in equity, is admitted; but the question is, whether the distinction between such trusts as are executed, and such as are purely executory, is still a sound, substantial, and effective distinction, or a distinction which has nothing real or equitable to support it? Before I apply myself to the establishing of the affirmative proposition, namely, that such a distinction is still a sound, substantial, and effective distinction, I shall beg the reader's attention to the cases whence I conceive it will most conclusively appear that such distinction did formerly prevail. The first case reported, in which this distinction appears to have been relied on, is *Leonard* v. *Earl of Sussex*, 2 Vern. 526; which was a devise to trustees for payment of debts, and in trust to settle the remainder on *A. B.* and the heirs of his body, with remainder, &c. ever taking special care in such settlement that it never be in the power of *A. B.* &c. to dock the entail during his life, &c. The court decreed that *A. B.* should be only tenant for life, without impeachment of waste, and should not have an estate tail conveyed to him; and the reason assigned for the decree was, because here *the estate is not executed but only executory.* In this

remainder on her son *B.* and the heirs of his body, with remainder over; and directs,

case nothing could be more evident than the intent of the testator to restrain the alienation of the estate by *A. B.*; but if the estate had been devised immediately to *A. B.* or by way of trust executed, could such intention, evident as it was, have received effect? I should conceive that it could not. The next case in which the distinction was recognized and adopted was, the *Earl of Stamford* v. *Hobart*, 1 Bro. P. C. 288; in which case Lord Cowper expressly stated, as the ground and principle of his decision, that "in matters executory, as in case of articles, or a will *directing a conveyance*, where the words of the articles or will were informal or improper, that court would not direct a conveyance according to such improper or informal expressions in the articles or will, but would order the conveyance or settlement to be made in a proper and legal manner, so as might best answer the intent of the parties." But in the case of *Papillon* v. *Voice*, the force of the distinction is particularly observable; for Lord Chancellor King not merely stated that such a distinction did exist, but marked its effect, by allowing the legal rule to prevail as to that limitation in the will which included or carried the legal estate, and by allowing the intent to controul the legal rule, as to that part of the same will which was purely executory, though the words of the will were, except as to this difference, precisely the same. His Lordship's judgment is thus reported: "As to the other point, Lord Chancellor declared, the court had a power over the money directed by the will to be invested in land, that the diversity was were the will passes *a legal estate*, and where it is only *executory*,

that special care should be taken in the settlement, that it should never be in the

and the party must come to this court, in order to have the benefit of the will, *that in the latter case the intention should take place, and not the rules of law.*" In *Lord Glenorchy* v. *Bosville*, the distinction between trusts executed and executory was not only admitted, but the reason and principle upon which the distinction proceeds, is emphatically assigned. Lord Chancellor Talbot thus expresses himself: "But there is another question, viz. How far, in cases of trusts *executory* as this is, the testator's intent is to prevail over the strength and legal signification of the words? I repeat it, I think, in cases of trusts *executed*, or immediate devises, the construction of the courts of law and equity ought to be the same; for there the testator does not suppose any other conveyance will be made; but in *executory* trusts, he leaves somewhat to be done; *the trusts to be executed in a more careful and accurate manner.*" These authorities are certainly fully sufficient to the purpose of shewing that the distinction between trusts executed and executory was at least once allowed in our courts of equity as a clear, well known, and rational distinction, upon which grave and learned men might frame and rest their judicial decisions. But, as Lord Harkwicke, in the case of *Bagshaw* v. *Spencer*, 2 Atk. 583, is reported to have observed, that "all trusts are in the notion of law executory, and are to be executed in this court," it seems material to refer to those cases in which his Lordship has expressly recognized the distinction between trusts executed and trusts executory, lest it should be inferred from the above observation, that his Lordship intended to reject such distinction. In *Roberts* v. *Dixwell*, 1 Atk. 607,

power of her son to dock the entail: the son shall be only tenant for life, but without

Lord Hardwicke, C. observes, " In the present case here are *all sorts of trusts*, as to mortgage, sale, &c. but the latter part of the trust is merely *executory*, to be carried into execution after the performance of the antecedent trust: the whole direction therefore falls upon this court, and they are to direct how the parties are to convey. This court has taken much greater liberties in the construction of *executory trusts* than where the trusts are *actually executed*; as in the cases of the *Earl of Stamford* v. *Hobart*; *Papillon* v. *Voice*, and *Lord Glenorchy* v. *Bosville*. These cases shew that the court has taken a greater latitude, and the point which has governed them has been the intention of the testator." In *Baskerville* v. *Baskerville*, 2 Atk. 281, his Lordship is reported to have proceeded on the same distinction: " Here it is a bequest of a sum of money to be laid out in land, and therefore merely *executory*." The direct terms in which Lord C. Hardwicke appears in *Roberts* v. *Dixwell*, and *Baskerville* v. *Baskerville*, to have recognized and proceeded on the distinction between trusts executed and trust executory, will at least justify the presumption, that he did not intend, by his observation in *Bagshaw* v. *Spencer*, to reject such distinction; and especially as the expression allows of a different construction; for as Mr. Fearne has observed, " the first part of the position is true, that all trusts are *in notion of law* executory; but it does not follow that *courts of equity* may not distinguish *trusts themselves* into *executed* and *executory*." Essay on Con. Rem. 212. 4th edit. which they have done, by considering the trusts as executory where a conveyance is by the

impeachment of waste. And it is as strong in the case of an executory devise for the

testator directed in contradistinction to those trusts in which no such executory medium is referred to. The case of *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 206, being referred to, as one of the cases whence he draws his inference, the observation of Lord Thurlow, C. in referring to the case of *Glenorchy* v. *Bosville*, that it was an *executory* case, is at least sufficient to raise the presumption that his Lordship did not intend, in deciding the case at bar, to reject the distinction between trusts executed and executory. Having referred to the authorities which seem to me to afford the most irrefragable proof that such distinction was once known, and allowed to prevail in our courts of equity, I will now proceed to consider the cases whence it is inferred that such distinction no longer exists.

The first case referred to is *Doe* v. *Laming*, 2 Burr. 1108. The passage relied on I conceive to be this; "It was contended at the bar, that as to this point, there was a distinction between a trust and a legal estate; and that even in Chancery there was a distinction upon this point, between what they call a trust executed and a trust executory. It is true, these distinctions are to be met with, and have been mentioned, but there does not seem to be much solidity in either." Per Lord Mansfield. If the opinion of any single judge be sufficient to repel the force and to destroy the effect of a series of uniform decisions, I am far from unwilling to concede to that learned authority a well-founded claim to such extraordinary influence; but if the concurrent opinions of Lord

benefit of the issue, as if the like provision had been contained in marriage articles.

Cowper, Lord King, Lord Talbot, and even of Lord Hardwicke, presiding in a court of equity, called upon by the strongest sense of duty to inform themselves of the principles and extent of equitable jurisdiction, and supported in the discharge of that duty by the most distinguished abilities, can give to any distinction a weight and consequence sufficient to bear up against the opinion of any single judge, however pre-eminent his natural endowments or professional acquirements; I should submit, with great deference, to such an authority, that the distinction between trusts executed and trusts executory is now too deeply rooted in our equitable system to be shaken by its force.

The next case referred to is *Ambrose* v. *Hodgson*, Dougl. Rep. 323, in which case Mr. Justice Buller certainly has very distinctly stated, that the first and great rule in the exposition of all wills is, the intention of the testator expressed, which, if consistent with the rules of law, shall prevail. It is a rule to which all others must bend: It says, *If consistent with the rules of law;* but it must be remembered, that those words are applicable only to the nature and operation of the estate, and not to the construction of the words." The well-known accuracy of the reporter of that case will, I am persuaded, justify my presuming the opinion of the learned judge to be fully and correctly stated; and as I cannot discover in that opinion a single passage which expressly denies the distinction between trusts executed and executory, I must conclude, that such distinction, if affected in

But had she by her will devised to her sons an estate-tail, the law must have taken

any degree by the opinion, is affected by inference necessarily deducible from it; and I do agree, that the rule of construction laid down in that opinion does go a considerable way towards destroying the distinction; for when it is said that the intent shall prevail, if consistent with the rules of law, and that "the question, whether the intention be consistent with rules of law, can never arise till it is settled what the intention was;" and "this can only be discovered by taking the whole will together," the rule is stated (if by intention be meant the substantial and primary intention) with a latitude sufficient to comprehend the principle upon which courts of equity have proceeded in the construction of executory trusts: and in that view the distinction between trusts executed and executory may be superfluous. It is easy to lay down general rules; the difficulty is in the application of them. That courts of equity did at least formerly apply a principle of construction to executory trusts, which they did not conceive to be applicable to immediate devises or trusts executed, has been demonstrated by the cases referred to. The first of those cases, *Leonard* v. *Earl of Sussex*, is particularly apposite to the purpose of trying whether the rule of legal construction, as above stated, be the rule by which courts of law will proceed in the construction of wills; and if the application of the legal rule of construction to the circumstances of that case would induce a similar decision in a court of law, it will follow, that the necessity of such distinction is materially lessened: but if the application of the rule of legal construction would lead to a different decision,

place, and they have barred their issue, notwithstanding any subsequent clause or

one of these consequences must follow, either the decree in that case was against the intent, or that the true rule of legal construction is not sufficiently comprehensive in its application to every case to effectuate the intent. I have already stated the directions of the will in that case; but the repetition will, I trust, be excused. *A.* devises lands to trustees for the payment of debts, and afterwards to settle the remainder, one moiety to her son *B.* and the heirs of his body, taking special care in the settlement that it never be in the power of her said son to dock the entail of this moiety. The intention of the testatrix, that *B.* should not have it in his power to alien, is expressed in terms; the necessary consequence of such an intimation of intention, (if the substantial intent be to prevail,) seems to be, that he should not take an estate to which the right of alienation by recovery would be incidental; but suppose the devise had been intermediate or by way of trust executed to *B.* and the heirs of his body, followed with a clause, restraining him from suffering a recovery, could such intention, restrictive of a right incidental to an estate tail, have received effect either in law or equity? Where the trust is executed, it is agreed that the rule of law must prevail. What is the rule of law upon this point? I will state it from Mr. Justice Buller's opinion in *Ambrose* v. *Hodgson*. "A man cannot by will," &c. "prevent a tenant in tail from suffering a recovery." But the legal import of the words of the will give an estate tail, subject to such restrictive clause, shall they prevail?" If it be said that such clause, being restrictive of the right of alienation incidental

declaration in the will, that they should not have power to dock the entail; for a devise

to an estate tail, furnishes evidence that the intention of the testator was to give an estate to which such right of alienation was not incidental, and that courts of law will, in the construction of the devise, reject the effect of the words of limitation, the judgment of law would be the same as was the decree in equity. But it would remain for courts of law to state that kind of case to which, in the construction of a devise, the rule which determines that a testator shall not prevent the devisee of an estate tail from suffering a recovery, and that therefore the repugnant clause shall be rejected, would be effectively applicable; for it seems, to my apprehension, that every limitation in which such intention, restrictive of the right incidental to an estate tail, appeared, would furnish a ground for cutting down the estate tail, (though created by express technical words) to an estate for life; lest, by allowing the terms of limitation their full force and effect, the object of the clause restrictive of their consequence should be disappointed. But if, in the case of *Leonard* v. *Earl of Sussex*, the devise had been immediate, or the trust executed, followed by a clause that the devisee should not alien or dock the entail, and a court of law could not, in respect of the declared intention of the testator, that the devisee should not alien, have given effect to such intention, for that the devise being of an estate tail, the restrictive clause was repugnant, and could not be supported, it must follow as a necessary consequence, that either the decree in equity upon that case was wrong, in giving effect and operation to the restrictive clause, or that the distinction upon which the decision

differs from marriage articles in this respect, that the issue under marriage articles

of the court proceeded, namely, that the trust was executory, gives a wider range than has the rule which governs courts of law and equity, in the construction of immediate devises or trusts executed. But if that part of the legal rule of construction, " if consistent with the rules of law," be applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words; and if, in order to ascertain the estate intended to be devised, the whole of the will is to be consulted, (which I agree in certain cases it must,) the legal rule of construction so stated appears to me absolutely incapable of receiving an additional extent in equity; and that those clauses which have hitherto been conceived to be void, because repugnant, ought to controul those words of limitation to which they are repugnant: for where a man devises an estate in terms which carry a fee-simple or fee-tail, and proceeds to declare his intent, that the devisee shall not alien the devised estate, it seems to be a fair inference, that in using terms which carry the absolute or qualified fee, he was either acquainted with their technical import, or being unacquainted with their import, had inadvertently applied them ; their legal effect being so inconsistent with his intention, declared in terms, not of a peculiar technical signification, but of plain, familiar and common use. How far the apparent intent ought, in the case of immediate devises, to controul certain established rules of legal construction, has been considered in a tract published by Mr. Hargrave, entitled, " Observations concerning the Rule in Shelly's Case," with a profundity of learning, to which nothing could have added effect but the pre-

claim as purchasers (3), but under a will they are only volunteers (*r*).

(3) *Bale* v. *Coleman*, 1 P. Wms. 145.

cision and energy with which it is applied. I shall therefore beg to refer to the arguments there urged, as furnishing demonstration upon this part of my proposition, that in the construction of immediate devises or trusts executed, the most evident intention of the party must give way to those great and fundamental rules which serve as land-marks in the disposition of real property.

The case of *Jones* v. *Morgan* is also referred to; but after giving to the very elaborate judgment in that case the most attentive consideration, I continue at a loss to discover the premises whence it can be concluded that the distinction between trusts executed and trusts executory no longer exists. I have already referred to the observation which fell from Lord C. Thurlow, when considering the effect of *Lord Glenorchy* v. *Bosville*, that it was an *executory* case. The observation seems to admit that such cases might exist, and inclines me to conclude, that its object was to distinguish such cases from the case at bar, which, to adopt his Lordship's expression, if not the case of a legal estate, was only not so, because the first use, (payment of debts,) might absorb the whole estate. I have been led by the importance of the point into a train of observations much beyond my original intent, but the respect due to the authorities relied upon, demanded more than ordinary attention; I cannot conclude without acknowledging the assistance which I have derived from Mr. Fearne's valuable essay.

(*r*) This distinction between the issue being purchasers under marriage articles, and only volunteers

under a will, does not hold in those cases in which the will creates an executory trust in their favour; "for every cestuy que trust, whether a volunteer or not, or be the limitation under which he claims with or without consideration, is entitled to the aid of a court of equity, in order to avail himself of the benefit of the trust." Per Sir Jos. Jekyll, 3 P. Wms. 222. *Austin* v. *Tate*, Ambl. 376.

SECTION IX.

AND as this court is to enforce the execution of agreements, and regards the substance only and not forms and circumstances (1), it therefore looks upon things agreed to be done as actually performed (*s*),

(1) Francis's Maxims, max. 13.

(*s*) Upon this principle it was held that the personal estate of a man, who, in consideration of marriage with an orphan of a citizen of London, had covenanted to take up his freedom of the city, should be divided according to the custom, though the covenant was not performed; *Frederick* v. *Frederick*, 1 P. Wms. 710. But it may be material to remark, that nothing is looked upon in equity as done but what ought to be done, not what might have been done; nor will equity consider things in that light in favour of every body, but only for those who had a right to pray it might be done. Per Sir Thomas Clerk, *Burgess* v. *Wheate*, Bla. Rep. 123. 2 Vern. 284. 3 Atk. 680.

as money covenanted (*t*) to be laid out in land to be in fact a real estate (*v*), which

(*t*) The rule equally applies to money devised to be laid out in land. The authorities to shew that money agreed or directed to be laid out in land, is to be considered as land, are very numerous. The force of the rule is particularly evinced by those cases in which it has been held, that the money agreed or directed to be laid out so fully becomes land, as, 1st, not to be personal assets; *Earl of Pembroke* v. *Bowden*, 3 Ch. Rep. 115. 2 Vern. 52; *Lawrence* v. *Beverley*, 2 Keble, 841; cited also in *Kettleby* v. *Atwood*, 1 Vern. 741; 2dly, to be subject to the courtesy of the husband, though not to the dower of the wife; *Sweetapple* v. *Bindon*, 2 Vern. 536; *Otway* v. *Hudson*, 2 Vern. 583; 3dly, to pass as land by will, if subject to the real use at the time the will was made; see c. 4. s. 2. note (*n*). See also *Milner* v. *Mills*, Moseley, 123; *Greenhill* v. *Greenhill*, 2 Vern. 679. Pre. Ch. 320; *Shorer* v. *Shorer*, 10 Mod. 39; *Lingen* v. *Sowray*, 1 P. Wms. 172; *Guidott* v. *Guidott*, 3 Atk. 254; 4thly, not to pass as money by a general bequest to a legatee; but it will, by a particular description, as so much money to be laid out in land; *Cross* v. *Addenbroke*; *Fulham* v. *Jones*, cited in a note to *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 222; or by a bequest of all the testator's estate in law and equity; *Rushleigh* v. *Masters*, 1 Ves. jun. 204. But equity will not consider money as land, unless the covenant or direction to lay it out in land be express; *Symons* v. *Rutter*, 2 Vern. 227; *Curling* v. *May*, M. 8 G. II. cited in *Guidott* v. *Guidott*, 3 Atk. 255. And as money agreed or directed to be laid out in land shall in general be considered as land, so land agreed or directed to be sold shall be considered

shall descend to the heir (2). So where money is agreed on marriage to be laid

(2) *Babington* v. *Greenwood*, 1 P. Wms. 532. *Lechmere* v. *E. of Carlisle*, 3 P. Wms. 211. Forrest. 90. *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171. *Chaplin* v. *Horner*, 1 P. Wms. 483. *Scudamore* v. *Scudamore*, Pre. Ch. 543. *Hancock* v. *Hancock*, 1 Eq. Ca. Ab. 153. c. 8. *Knight* v. *Atkins*, 2 Vern. 20.

and treated as money; Gilb. Lex Prætoria, 243; but see *Ashby* v. *Palmer*, 1 Merivale's R. 296; as to from what time the conversion shall be supposed, see *Sitwell* v. *Bernard*, 6 Ves. 520; *Elwin* v. *Elwin*, 8 Ves. 547; and the creditors of the bargainor may compel the heir to convey the land; *Best* v. *Stamford*, 1 Salk. 154; but it must not be understood, that where a testator directs his real estate to be sold for purposes which are answered out of the personal estate, that the next of kin may insist upon the real estate's being sold, for "there is no equity between the next of kin and the heir, but the general principle is, that the heir takes all that which is not for a defined and specific purpose given by the will." *Chitty* v. *Parker*, 2 Ves. jun. 271. *Ex parte Bromfield*, 1 Ves. jun. 453; *Oxendon* v. *Lord Compton*, 2 Ves. jun. 69; *Walker* v. *Denne*, 2 Ves. jun. 170; *Lord Compton* v. *Oxenden*, 2 Ves. jun. 261; but see *Wheldale* v. *Partridge*, 8 Ves. 235; and where the testator was entitled to a fund, as money or land, his real and personal representatives shall take it as money or as land, according as the testator would have taken it; see *Ackroyd* v. *Smithson*, and the cases there cited, 1 Bro. Ch. Rep. 503; see also *Hewitt* v. *Wright*, 1 Bro. Ch. Rep. as to Lord Thurlow's opinion, that money resulting to the heir, as being produced by sale of real estate undisposed of, is to be considered as personal estate of the heir, and as such would go to his executor; *Russell* v. *Smythies*, 1 Cox's R. 215. But if the use and possession were not united it would still

out in land, and settled to the use of the husband and wife for their lives, remainder to their first and other sons in tail, remainder to the daughters in tail, remainder to the right heirs of the husband, provided, that if the husband died without issue, the wife might make her election, whether she would have the land or money; this money is bound by the articles, and shall not be assets to satisfy creditors, but the heir shall have it, as the land should have gone,

be considered as land; *Rashleigh* v. *Masters*, 1 Ves. jun. 201. *Wheldale* v. *Partridge*, 8 Ves. 235.

(*v*) If the particular estate contracted for cannot be had, the money shall be laid out in other land; *Whitaker* v. *Whitaker*, 4 Bro. Rep. 31. See *Broome* v. *Monck*, 10 Ves. 597. 605. contrà. See also *Wade* v. *Paget*, 1 Cox's Rep. 74; in which case it was held that the breach of covenant by the vendor is to be made good in damages, which will go as personal estate of the testator. It may be material to remark, that this rule of considering money as land, or land as money, does not apply, if the special purpose for which the money is directed to be laid out in land, or the land to be converted into money, fail; *Cruse* v. *Baily*, 3 P. Wms. 20; *Mallabar* v. *Mallabar*, Forrest. 79; *Dunour* v. *Matteux*, 1 Ves. 320; *Ackroyd* v. *Smithson*, 1 Bro. 503; *Robinson* v. *Taylor*, 2 Bro. 589; *Spink* v. *Lewis*, 3 Bro. 355; neither does it apply if the effect would operate an escheat; *Walker* v. *Denn*, 2 Ves. jun. 170.

in case the money had been laid out according to the articles; and here the husband having issue at his death, though it died soon after, he could not be said to die without issue, so no election could arise to the wife (3).

(3) *Kettleby* v. *Atwood*, 1 Vern. 471.

SECTION X.

But some say, that although money shall in many cases be considered as land, when bound by articles, in order to a purchase; yet whilst it remains still money, and no purchase made, the same shall be deemed as part of the personal estate of such person who might have aliened the land, in case a purchase had been made (*u*). As

(*u*) The authority of the case referred to was very much shaken by the observations which fell from Sir Joseph Jekyll, Master of the Rolls, and Lord Talbot, C. in their respective judgments in *Lechmere* v. *Earl of Carlisle*, 3 P. Wms. 220. Forrest. 90. Lord Thurlow, C. has, however, restored its weight, by expressly recognizing and deciding upon its principles, in the case of *Pulteney* v. *Earl of Darlington*, "that where a sum of money is in the hands of one, without any

if the limitation were to be of the lands, when purchased, to the husband for life, remainder to his intended wife for life, remainder to first and other sons in tail, remainder to daughters, remainder to the right heirs of the husband; this money, though once bound by the articles, yet when the wife died without issue, became free again, and was under the power and disposal of the husband, as the land would likewise have been, in case a purchase had been made pursuant to the articles, and therefore would have been assets to a creditor, and must have gone to the executor or administrator of the husband; and the case is much stronger, where there is a residuary legatee (1.) Yet there can be no fine levied of money (2) in trustees' hands to be laid out in lands (*x*).

(1) *Chichester* v. *Bickerstaff*, 2 Vern. 295. *Pulteney* v. *Earl of Darlington*, 1 Bro. Ch. Rep. 236. (2) *Benson* v. *Benson*, 1 P. Wms. 130. *Wade* v. *Paget*, 1 Bro. Ch. Rep. 368.

other use but for himself, it will be money, and the heir cannot claim;" "like the case (added his Lordship) of *Chichester* v. *Bickerstaff*, against which I think there is no judgment, though there are a number of opinions. I know no better authority than that case;" see note (*t*).

(*x*) But a decree will bind the money as effectually as a fine could have bound the land, for equity alone

views it in the light of real estate; and whatever doubts formerly prevailed respecting the right of such persons to the money, who, if the money had been laid out in land, might, by fine, have acquired an absolute estate in the land, (see *Eyre's* case, 3 P. Wms. 13.) it is now however settled, by 40 G. III. c. 56. called Lord Eldon's Act, that wherever a fine would have rendered the party absolute owner of the land, he is immediately entitled to a decree for the money; see *Benson* v. *Benson*, 1 P. Wms. 130. *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171. *Oldham* v. *Hughes*, 2 Atk. 452. *Trafford* v. *Boehm*, 3 Atk. 440. 447. *Cunningham* v. *Moody*, 1 Ves. 174. *Pearson* v. *Lane*, 17 Ves. 104. But if a recovery would have been necessary for such purpose, equity will decree the money to be laid out, that those in remainder may have their chance; *Short* v. *Wood*, 1 P. Wms. 471. *Colwall* v. *Shadwell*, cited 1 P. Wms. 471. 485. *Edwards* v. *Countess of Warwick*, 2 P. Wms. 171. *Cunningham* v. *Moody*, 1 Ves. 174. *Collett* v. *Collett*, 1 Atk. 11. *Trafford* v. *Boehm*, 3 Atk. 447. The reason of this distinction is, that a fine may be taken in vacation, so as to bar the issue, but a recovery can only be suffered in term time. See *Carter* v. *Carter*, Forrest. 272. That equity will not decree the money to an infant, who would be tenant in tail with remainder in fee, as he could not levy a fine during his infancy; See *Carr* v. *Ellison*, 2 Bro. C. R. 56. *Earlom* v. *Sanders*, Ambl. 242.

SECTION XI.

BUT 2dly, We are to treat of such rules as belong more immediately to the municipal law: since where there is no particular motive for equity to interpose, the court of Chancery follows the law. And here we may observe in general, that interpretation is a collection of the meaning out of signs most probable: and these are words and other conjectures. As for words, the rules are well expressed in the ancient form of making leagues, which appointed that the words should be expounded fairly, in the common sense that the words bore in that place at that time (1). And the difference is apparent between writs and deeds or wills (*y*). For in adversary writs, nothing shall be demanded or recovered, but according to its proper signification: and therefore a reputed name will not serve. But in deeds or wills they shall be taken according to the common intendment and

(1) Grotius, lib. 2. c. 16. s. 1. Puff. b. 5. c. 12. Livy, lib. 1. 24.

(*y*) The rules which govern the construction of deeds and wills are very particularly considered in Sheppard's Touchstone, ch. 5, and 2 Bla. Com. 379.

phrase of the country; and so in a verdict, or an amicable writ: as a fine or recovery. But as to names, either of the person or thing, in deeds and wills, or amicable writs, the general rules are these: 1st, Quod de nomine proprio non est curandum dum in substantiâ non erretur, and therefore a reputed or known name is sufficient; and this need not be time out of mind, as in prescriptions, but such convenient time as they may be known by such name in vicineto where it is to be tried. 2dly, Quod nihil facit error nominis cum de corpore constet (2); and therefore, where the thing passes by livery, præsentia corporis tollit errorem nominis (*y*). 3dly, If there be two of the same name (3), there the intent shall be taken (*z*). 4thly, In case of a

(2) *Sir Moyle Finch's* case, 6 Rep. 64.

(3) Lord Bacon's Maxims, reg. 23. *Lord Cheney's* case, 5 Rep. 68.

(*y*) Lord Bacon, in his Maxims, reg. 25. has illustrated this rule by a great variety of cases, to which I beg to refer.

(*z*) In such case, for the purpose of collecting the intent, parol evidence must be admitted, ambiguitas verborum latens verificatione suppletur nam quod e facto oritur ambiguum, verificatione facti tollitur. See *Ulrich* v. *Lichfield*, 2 Atk. 372. *Dowset* v. *Sweet*, Ambl. Rep. 175. *Fonnereau* v. *Poyntz*, 1 Bro. Ch. Rep. 472. *Stebbing* v. *Walkey*, 2 Bro. Ch. Rep. 85.

corporation (4) or common person, a description which is vicè nominis, is sufficient, if the person be so described as he may be certainly distinguished from other persons (5). As heirs of the body of J. S. now living (*a*) is tantamount to heir apparent (6). So, where he takes notice in the will, that others were his heirs general; a limitation to his brother's son by the name of heir male, is a good name of purchase (7). But as all devises to disinherit an heir at law are to be taken strictly, and the words heirs male being a legal term, where they are not accompanied with any other words to determine the sense otherwise, as heir apparent, or heir now living, &c. they cannot amount to a sufficient description of the person (8), if there be another who is heir general (*b*). But a re-

(4) The case of the *Chancellor of Oxford*, 10 Rep. 53. b. Dr. Ayray's case, 11 Rep. 21.

(5) *Counden* v. *Clerke*, Hob. 32.

(6) *Burchett* v. *Durdant*, 2 Ventr. 311. Pollexf. 457. 2 Lev. 232. S. C.

(7) *Baker* v. *Hall*, 1 Eq. Ca. Ab. 214. pl. 12. Stra. 41. *Newcomen* v. *Barkham*, 2 Vern. 729. Pre. Ch. 442. 461. Mr. *Hargrave*'s note, Co. Litt. 33. b. Stra. 35.

(8) Co. Litt. 24 b.

Spink v. *Lewis*, 3 Bro. Ch. Rep. 355. *Baugh* v. *Read*, 1 Ves. jun. 259. *Wild* v. *Hobson*, H. T. 1819. V. Ch.

(*a*) And as a limitation to the heirs of the body of *A.* then living, shall be good as designatio personæ, notwithstanding the rule non est hæres viventis; so a limitation to the heirs of the body of *A.* then begotten, shall prevail. See Darbison on dem. of *Long* v. *Beaumont*, 1 P. Wms. 229. 1 Bro. P. C. 489. *Goodright* v. *White*, 2 Bla. Rep. 1010.

mainder to the heirs male of the body of E. L. is good, though E. L. is living at

(*b*) The cases in which it has been held that the person described as an heir special need not answer both parts of the description, by being actually heir, as well as that species of heir denoted by the description, seem to have materially broken in upon the doctrine of Lord Coke upon the subject: see Co. Litt. 24. b. and which doctrine has been pursued in many cases, exclusive of those on which Lord Coke relied, particularly in *Counden* v. *Clerke*, Hob. 29. *Southcott* v. *Stowell*, 1 Freem. 216. *Lord Ossulston's* case, 3 Salk. 336; and *Dawes* v. *Ferrers*, 2 P. Wms. 1. *Starling* v. *Ettrick*, Pre. Ch. 54. Mr. Hargrave has, with his usual ability, attempted to vindicate the propriety of Lord Coke's doctrine, observing, that it may be doubted whether there is a passage in all his works more capable of standing the severest test of modern criticism; and having examined the circumstances of the cases supposed to have weakened its authority, concludes his note p. 32. (*a*), with remarking, that Lord Cowper's judgment in *Newcomen* v. *Barkham*, which was materially shaken in its principle by what fell from Lord Hardwicke, in decreeing upon the bill of review, is the only direct authority against Lord Coke. In a following note, however, p. 164. (*a*), he candidly admits, that since writing his former note, a case has been published, in which the Court of King's Bench, after three arguments, decided against applying the above rule to a will; *Wills* v. *Palmer*, 5 Burr. 2615; and that in another, which was also three times argued, the court of Exchequer had refused to apply the rule to a marriage settlement; Evans on dem. of *Burtenshaw* v. *Weston*, Exch. M. 1774, or H. 1775.

the time when the remainder happened to take place, and the heir apparent shall take (9).

(9) Darbinson on dem. *Long* v. *Beaumont*, 1 P.Wms. 229.

This concurrence of authority, the result of so much deliberation (for both courts appear to have weighed the subject with the most anxious attention), seems to have given a weight to the decree in *Newcomen* v. *Barkham*, beyond that to which Lord Hardwicke thought the principle entitled. I cannot, however, conclude this note, without recommending the reader to consult Mr. Hargrave's observations in support of Lord Coke's doctrine, that to take as a purchaser by description of a special heir, every part of the description must unite in the claimant. See also Mr. Fearne's Essay on Con. Rem. p. 319. 4th edit. and *Gwynne* v. *Hook*, 1 Wils. 30.

SECTION XII.

And not only the place, but the time is material; for the contract takes effect immediately (1), and therefore is to be interpreted as matters stood at the time (2). As in a loan, the value is to be estimated as

(1) Domat, Civ. L. b. 1. tit. 1. s. 3. 5.

(2) *Marsh* v. *Jones*, 2 Leo. 117. *Humphreys* v. *Knight*, Cro. Car. 455. *Berty* v. *Dormer*, 12 Mod. 526.

it was at the time of the contract (3). So in a will, the value of a legacy of sugars, payable such a year, after the time is elapsed, becomes a personal duty to be paid in money here of a mean value of the sugars there in that year (4). So if a settlement for a jointure is made in pursuance of articles, and there is a covenant in the articles, that the lands are of such a yearly value, but it is omitted in the settlement; yet the covenant shall be decreed *in specie*, but the value of the lands is to be estimated, with reference to the time of the jointure settled, and not according to the present value, unless the covenant had been that they should continue of their then value (5). But every man is to suffer for his own delay or neglect. And therefore he who does not perform his part of the contract at the time agreed on by the parties, or appointed by law, must stand to all the consequences (*c*). As, if *A.* is

(3) *Ellis* v. *Lloyd*, 1 Eq. Ca. Ab. 289. pl. 3.

(4) *Symes* v. *Vernon*, 2 Vern. 553.

(5) *Speake* v. *Speake*, 1 Vern. 217.

(*c*) See c. 6. s. 2, in which the principle upon which courts of equity relieve against lapse of time is considered, and several cases illustrative of its reason and extent are particularly referred to. Many other cases might, however, be added, in which equity has refused to relieve against the lapse of time, when the covenant, not being mutual, some particular act was to be done

bound to transfer stock before the 30th of September to *B.* and the time is past, and the stock much risen; he shall still be obliged to transfer so much stock *in specie*, at the price it is now at, and account for all dividends from the time that it ought to have been transferred (6).

(6) *Gardner* v. *Pullen*, 2 Vern. 394. but see c. 1. s. 5. note (*q*). c. 2. s. 11. note (*h*). c. 3. s. 1. note (*c*).

by the one party, to entitle himself to the benefit of a covenant by the other. Thus in *Allen* v. *Hilton*, MSS. 22 Feb. 1738, the defendant had covenanted to renew the plaintiff's lease, at the request of the plaintiff, within three months before the expiration of the then granted lease. The lease being within a month of expiring, and the plaintiff not having requested a renewal, the defendant agreed to lease the premises to other persons. The plaintiff then being in possession, applied for a new lease, which defendant refusing, he filed his bill. The Lord Chancellor was clearly of opinion, that the plaintiff having omitted to apply at the time agreed on, was not entitled to relief; observing, that if a lessee were relievable in such a case, he knew not where the court could stop: it would be saying, the lessee shall be loose, and the lessor bound. It may be observed that the case referred to, was a lease of a colliery, which, from the nature of the property, might have influenced the judgment of the court; and the Chancellor certainly does appear, in the note which I have of the case, to have adverted to such circumstance; but his Lordship seems to have rested his decision upon general principles, and not upon the particular circumstances of the case. See *City of London* v. *Mitford*, 14 Ves. 58. So in the case of *Bailey*

v. *Corporation of Leominster*, Lord Thurlow, C. held, that a lessee for lives, entitled by covenant to a renewal on application, whenever one of the lives should fall, was not entitled to such renewal upon his application, when two lives were dropped, though he offered to pay the fines, &c. for both lives; his Lordship observing that the covenants were not mutual. See *Armiger* v. *Clarke*, Bunb. 111, 112. *Howel* v. *George*, 1 Madd. 12. But see *Rawstone* v. *Bentley*, 4 Bro. Ch. 418; see also *Baynham* v. *Guy's Hospital*, 3 Ves. 295; as to covenants to renew, see *Tritton* v. *Foote*, 2 Bro. Ch. 636; Cowp. 819. 7 Bro. P. C. 432. 2 Vern. 477, 2 P. Wms. 196. 3 Atk. 83. 3 Ves. 298. 694.

SECTION XIII.

IT is certain, therefore, that when words may be satisfied, they shall not be restrained further than they are generally used, but they are to be understood in their proper and most known signification (*d*). But all

(*d*) Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa fienda est; Co. Litt. 147. a. "But where the intention is apparent, too much regard must not be had to the native and proper definition, signification, and acceptance of words and sentences;" Sheppard's Touchstone, c. 5. p. 87. "For

the clauses of covenants are to be interpreted one by another, in giving to each of them the sense which results from the whole; for it is one entire deed which ought to agree with itself, and all the words take effect by one livery, and all tend to one end and purpose (*e*). And all deeds

the words are not the principal thing in a deed, but the intent and design of the grantor; and the law commends the astutia, the cunning of judges, in construing words in such manner as will best answer the intent. The art of construing words in such manner as shall destroy the intent may show the ingenuity of counsel, but it very ill becomes a judge." Per Lord C. J. Willes, *Dormer* v. *Parkhurst*, 3 Atk. 136; see also *Earl of Clanrickard's* case, Hob. 277; see c. 3. s. 1. note (*b*). But the intent shall not prevail, if inconsistent with any established rule of law; Plow. 162. b. Corbet's case, 1 Rep. 85. b. *Pybus* v. *Mitford*, 1 Ventr. 379. *Hearn* v. *Allen*, Hutt. 86, cites *Abraham* and *Trigge*, cited in *Berresford's* case, 7 Rep. 41. In collecting the intent, common usage is frequently resorted to; Saville, 124.

(*e*) The construction must be upon the entire deed, and not upon disjointed parts of it; nam ex antecedentibus & consequentibus optima est interpretatio & turpis est pars quæ suo toto non convenit; 1 Bulstr. 101. Plowd. 161; and this rule of construction prevails both in law and equity; Per L. C. Parker, *Butler* v. *Duncomb*, 1 P. Wms. 457. That a legal instrument shall not be construed by the act of the parties, see *Baynham* v. *Guy's Hospital*, 3 Ves. 295. *Eaton* v. *Lyon*, 3 Ves. 694.

are but in the nature of contracts, and the intention of the parties reduced into writing; and the intention is chiefly to be regarded (1). In an act of parliament, the intent appearing in the preamble shall control (*f*) the letter (2) of the law: (for the preamble is as a key to open the meaning of the act, though in reality it is no part of the act, and introduced but of late years;) and in case of a deed made in pursuance of articles, the articles show the

(1) Per Master of the Rolls in *Baden* v. *E. of Pembroke*, 2 Vern. 58.
(2) *Ryall* v. *Rolle*, 1 Atk. 175. 182. 1 Ves. 365. 371.

(*f*) This rule was with some warmth reprobated by Lord C. Cowper, in the case of *Copeman* v. *Gallant*, 1 P. Wms. 320; and indeed seems irreconcileable with *Barker* v. *Reading*, Palm. 485. Sir William Jones, 163, and the cases there referred to. *Lees* v. *Summersgill*, 17 Ves. 510. And though Lord Chief Baron Parker and Lord C. Hardwicke, in the case of *Ryall* v. *Rolle*, referred to in the margin (2), rejected the rule laid down by Lord Cowper, that the preamble should not be allowed to restrain the operation of an enacting clause; yet they did not go the length of holding that the preamble should in all cases control and restrain the enacting clause, the Lord Chief Baron expressly confining his position to those cases where not restraining the generality of the enacting clause would be attended with inconvenience, 1 Ves. 365. As to the principal rules to be observed in the construction of acts of parliament, see Introduction to Bla. Com. s. 3. and 3 Rep. 7. Lord Bacon's Readings on Statutes of Uses, 334. *Wolsustan* v. *Bp. of Lincoln*, 2 Wil. Rep. 174.

intent of the parties as much as a preamble can that of an act of parliament (*g*).

(*g*) The cases in which equity varies the settlement, the settlement purporting to be made in pursuance of the articles, may be referred to mistake or fraud; on either of which grounds equity may and will interpose, to enforce the spirit and the object of the articles: "1st, because they are upon valuable consideration; 2dly, Because they are to be carried into execution against the parents; 3dly, That were they to put the children completely in the power of either parent, there would be no object of the contract." Per Lord C. Thurlow, *Jones* v. *Morgan*, 1 Bro. Ch. Rep. 222.

SECTION XIV.

AND it is a general rule, that several deeds made at one time (*h*) are to be taken as one assurance (1); yet every one hath its

(1) *Lord Cromwell*'s case, 2 Rep. 74. b. 75. a. *Earl of Leicester*'s case, 1 Ventr. 278. *Havergill* v. *Hare*, Cro. Jac. 510. *White* v. *West*, Cro. Eliz. 792. *Ferrers* v. *Fermor*, Cro. Jac. 643. *Selwyn* v. *Selwyn*, 2 Burr. 1131. *Roe.* on dem. of *Noden* v. *Griffith*, 4 Bur. 1953. *Vaughan*, on dem. of *Atkins*, v. *Atkins*, 5 Burr. 2764. *Williams* v. *D. of Bolton*, 2 Ves. jun. 138.

(*h*) Where the first conveyance is imperfect of itself, and is to receive its perfection from a subsequent act, then of necessity the two instruments must be taken as

distinct operation to carry on the main design. And therefore, where a man covenanted by marriage articles to pay the legacies charged upon his wife's estate, and gave a statute, and also a mortgage of his own estate, to secure the same, and by an indorsement upon the mortgage the same was to be void, unless the wife's estate was settled upon him for life, &c. according to the marriage articles: this indorsement, though upon the mortgage only, is sufficient to discharge the statute and articles (2). Besides, they being all executed at one and the same time, the same witnesses, and part of the same agreement,

(2) *Lawrence* v. *Blatchford*, 2 Vern. 457.

one entire conveyance; as covenant to levy a fine or suffer a recovery, or a covenant for further assurance, and assurance afterwards made; and there is no incongruity that an imperfect thing should wait for its perfection from a subsequent act, for nothing passes in the mean time. (See Seymour's case, 10 Rep. 95. b.) But where the first act is of sufficient ability to pass an estate, the law will not expect a future act, though to some collateral purposes it would pass it stronger." *Herring* v. *Brown*, Skinner's Rep. 186. For the various cases in which several deeds will be considered but as one entire conveyance, see 16 Vin. Ab. 138. It is, however, observable, that when a deed purports to be an absolute conveyance, a defeasance by a separate deed will be deemed very suspicious. *Cotterell* v. *Purchase*, Forrest. 61.

are all to be looked upon as but one conveyance. So where a father put his son apprentice, and gave a bond for his fidelity, and at the same time took a covenant from his master, that he should at least once a month see his apprentice make up his cash; this bond and covenant ought to be taken as one agreement (*i*), and therefore the father shall be answerable for no more than the master could prove the apprentice embezzled in the first month when the embezzlement began (3).

(3) *Montague* v. *Tidcombe*, 2 Vern. 519.

(*i*) But where the father, upon payment of a sum which his son had embezzled, desired the master not to trust the son any more with the cash, it was held that such request would not discharge him from the bond which he had entered into for his son's fidelity; but the court refused to extend his liability beyond the amount of the bond. See *Shepherd* v. *Beecher*, 3 P. Wms. 287.

SECTION XV.

BUT that which helps us most in the finding out the true meaning, is, the reason or cause which moved the will. And this is of the greatest force, when it evidently appears that some one reason was the only motive that the parties went upon; which is no less frequent in laws than in facts. And here that common saying takes place, *that the reason ceasing, the law itself ceases* (1). So a present made in prospect of marriage may be revoked, and demanded back, if the marriage does not take effect (2), especially, if it sticks on that side to whom the present was made (*k*). And with this

(1) Co. Litt. 70. b.

(2) Cited p. North, C. J. in *Beaumont* v. ———, 2 Mod. 141. See also 14 Vin. Ab. Gift 19. pl. 7.

(*k*) The same rule prevailed in the civil law; Dig. lib. 13. tit. 4. 2 Huberi Prælectiones, 394, 395. 2 Noodt. Com. 228; and still prevails in the law of Scotland under the same title, causâ datâ non secutâ; 1 Lord Bankton's Inst. 215. 21. Erskine's Inst. 444. 10. and in the case of *King* v. *Withers*, Forrest. 122. Lord Talbot refers to the principle of this rule, de causâ datâ non secutâ, as governing the decisions in which portions charged upon land, and made payable at a particular age, or on marriage, have been held to sink into

agreees the practice of the court of Chancery, where if a term be raised for a particular purpose in pursuance of marriage articles, when that purpose is answered, it shall fall again into the inheritance, and shall not be assets to pay any debts but what affect the inheritance; as bond-debts, and debts of a superior nature, and not simple contracts (3).

(3) *Best* v. *Stamford*, 1 Salk. 154. *Baden* v. *E. of Pembroke*, 2 Vern. 57, 58. See b. 4. part 2.

the land where the legatee or party has died before the period when, or event on which they were to be raised. The cases illustrative of that rule, and the exceptions which have been ingrafted on it, are referred to by Mr. Cox, 2 P. Wms. 612; and will be considered b. 2. part 1. c. 8. s. 7. See also B. 1. c. 6. s. 9.

SECTION XVI.

And the matter which he is about, is always supposed to be in the mind of the speaker; although his words seem to be of a larger extent (1) (*l*). As general words

(1) See *Ognell's* case, 4 Rep. 48. Cro. Car. 180.

(*l*) Where the purpose is distinctly recited in the instrument, inconvenience will rarely result from the

in a release of all demands, or the like, shall be restrained by the particular occa-

general words of the contract, &c. receiving such construction as will confine their operation to the declared purpose of the parties. Sensus verborum ex causâ dicendi accipiendus est, et sermones accipiendi sunt secundum subjectam materiam; 4 Rep. 13. b. *Payne* v. *Collier*, 1 Ves. jun. 171, (but where the purpose or object of the instrument is not distinctly recited, *Doran* v. *Ross*, 1 Ves. jun. 59), but it is to be collected from the substance of the instrument, great caution is necessary in allowing the general expression to be controlled upon the notion of its exceeding the particular purpose attributed to the parties. In *Thorpe* v. *Thorpe*, 1 Lord Raym. 235, the court thus stated the distinction: "Where there are only general words in a release, they shall be taken most strongly against the releasor; as where a release is made to *A.* and *B.* of all actions, it releases all several actions which the releasor has against them, as well as all joint actions; so if an executor releases all actions; it will extend to all actions that he hath in both rights. 2 Roll's Ab. 409. (A. 1.) but where there is a particular recital in a deed, and the general words follow, the general words shall be qualified by the special words." See also *Lord Arlington* v. *Merrick*, 2 Saund. 414. But though this distinction may be generally true, yet there certainly are cases in which it has not been strictly regarded, exclusive of those cases in which, if the general words had been allowed to prevail in their whole extent, an absurdity or manifest injustice would have ensued; see *Porter* v. *Phillips*, Palm. 218. Cro. Jac. 623. *Tisdale* v. *Essex*, Hob. 34, and *Hoe*'s case, 5 Rep. 70. b. in which case some material distinctions are stated. Several cases

sion, and shall be intended only of all demands concerning the thing released (2).

(2) *Knight* v. *Cole*, 3 Lev. 273. *Hoe's* case, 5 Rep. 70. b. *Henn* v. *Henson*, 1 Lev. 99. *Ingram* v. *Bray*, 2 Lev. 102. *Morris* v. *Wiford*, 2 Lev. 214. *Stephens* v. *Snow*, 2 Salk. 578.

in which the distinction above stated has not been allowed to prevail, are cited by Lord Bacon in his Maxims, as illustrative of the rule, "Verba generalia restringuntur ad habilitatem rei vel personæ." To the principle of this rule may also be referred those cases in which courts of equity have interposed, and decreed marriage settlements to be framed strictly, though the articles agreed on by the parties were so expressed as to give an estate of inheritance to one of them. For the principal object of such settlement being to provide for the issue, equity will not allow such purpose to be disappointed by general expressions in articles, which from their nature must be supposed to have been intended to be afterwards drawn out and extended with more technical precision and accuracy, with a view to effectuate their reasonably presumed intent; and in some cases equity has even supplied words to let in the issue, *Kentish* v. *Newman*, 1 P. Wms. 234. *Targus* v. *Puget*, 2 Ves. 194. And as the strict technical sense of words may in some cases be restrained, so in other cases, to effectuate the purpose, it may be extended and enlarged; as where an estate is devised for payment of debts, the fee shall pass, though there be no words of inheritance; *North* v. *Compton*, 1 Ch. Ca. 196. *Ackland* v. *Ackland*, 2 Vern. 687. So where an estate is devised, on condition that the devisee pay a gross sum—Collier's case, 6 Rep. 16. But the devisee, without words of inheritance, or other declaration of the devisor's intent, will not take a fee, if the payment of such sum is to be out of the rents and profits, *Ansley*

So the limitation of the trust of a term, which was the husband's, upon his marriage with *A.* to himself for life, remainder as to a moiety to *A.* for life, for her jointure, remainder to the heirs of the body of *A.* by him begotten, remainder as to the other moiety to the children of the body of *A.* must be intended the children of that marriage, and not as a provision for any child of her's by any other husband (3). So the condition of a recognizance shall be qualified in equity, according to the intent and equity of the case, for which it was given (4).

(3) *Daffarne* v. *Goodman*, 2 Vern. 362.

(4) *Holt* v. *Holt*, 1 Ch. Ca. 190, 191.

v. *Chapman*, Cro. Car. 157. See Mr. Bridgman's digested Index (Words). *Peat* v. *Powell*, 1 Eden's R. 479. *Price* v. *Gibson*, 2 Eden's R. 115.

SECTION XVII.

And from the regard that the law itself gives to the intention of the parties, it is that where there is a fine by way of render, there shall be no dower (1); and so a rent or recognizance shall not be extinguished,

(1) Co. Litt. 31. b.

by levying a fine to the party (2). And although a fine and non-claim is a good bar to an equity of redemption, or to a bill of review, yet it would be otherwise where levied upon the making of the mortgage only to strengthen the security (3). But there are some cases where equity (*m*) will carry the conveyance farther than intended upon apparent equity; as if a tenant in tail confess a judgment, &c. and suffer a recovery to any collateral purpose, that recovery shall enure to make good all his precedent acts and incumbrances (4).

(2) —— v. *Hawkes*, 2 Ch. Ca. 273. P. Master of the Rolls, 2 Vern.

(3) *Lingard* v. *Griffin*, 2 Vern. 189.

(4) *Hunt* v. *Gateler*, Poph. 5. 6, 7 Rep. 62. 2 Rep. 52. 1 Wils. 277. *Goddard* v. *Complin*, 1 Ch. Ca. 119. *Goodright*, ex dem. *Tyrill* v. *Mead*, 3 Burr. 1703. Cruise on Fines and Recoveries.

(*m*) The principle that a common recovery shall operate as a confirmation of any preceding incumbrances, created by the person who suffers such recovery, is very properly observed by Mr. Cruise to be founded on natural justice, which forbids men to defeat their own contracts; nor is it necessary to resort to courts of equity in order to make those principles available, courts of law having solemnly recognized their force, and in a variety of cases having given them their full effect. How such consequences may be obviated, see Mr. Butler's note, Co. Litt. 204. a.

SECTION XVIII.

And where words, if taken literally, are likely to bear none, or at least an absurd signification, to avoid such an inconvenience, we may deviate from the received sense of them (*n*); for the agreement of the

(*n*) If an absurdity would result from strictly pursuing the expression of the instrument, courts of law will, equally with courts of equity, cast about to discover the mean by which the real intent may receive effect, notwithstanding the untechnical language in which such intent is expressed; "for though an interpretation or construction ought not to be made against the letter of a deed, yet in some cases a strained and secondary interpretation may be admitted: and if the letter will bear a second and less genuine interpretation, it may be admitted ne detur absurdum; but where the intention of the parties is not clear and plain, but in æquilibrio, in such case a secondary and strained construction shall not be made, but the words shall receive their more natural and proper construction." Per Bridgman, C. J. *Earl of Bath*'s case, Carter's Rep. 108, 109. This distinction is agreeable to the rule, benignæ faciendæ interpretationes cartarum propter simplicitatem laicorum ut res magis valeat quam pereat; Co. Litt. 36. 183. a. which rule is allowed to control the application of every other rule of construction, nam legis constructio non faciat injuriam; and therefore, though it be a general rule of construction

parties is the only thing which the law regards in contracts. And it is a known rule, that a man's act shall not be void, if it may be good to any intent. For every conveyance is made for some purpose. So that for the necessity, ne res pereat, where there is no other way of satisfying the will and intent, the words may be taken in the most extensive and improper sense. As a rent or tithes will pass by a devise of all his lands (1). So a trust to raise out of the profits implies a sale (*o*), especially if

(1) Referred to in *Ashton* v. *Ashton*, 3 P. Wms. 384. *Acherly* v. *Vernon*, 9 Mod. 74.

that quælibet concessio fortissime contra donatorem interpretenda est, yet if tenant for life maketh a lease generally, this shall be by construction of law an estate for the life of the lessor; for if it should be a lease for the life of the lessee, it would be a wrong to him in reversion; and so a lease by tenant in tail, without mentioning for whose life, shall be construed a lease for life of lessor; but the construction would be otherwise of a lease made by tenant in fee; Co. Litt. 183. 42. a. *Sheppard's* Touchstone, 88. But, "though a deed may in some cases be expounded contrary to the strict import of its letter, yet this liberty of construction does not extend so as to make a deed, but merely to avoid some extremity which might ensue from a literal and strict construction of it." *Cheek* v. *Lsle*, Rep. Temp. Finch, 101.

(*o*) But though equity will in general consider a charge on the rents and profits to raise portions, &c.

it cannot be raised conveniently within the time limited (2). Otherwise if it be of the annual profits (3).

(2) *Heycock* v. *Heycock*, 1 Vern. 256. *Berry* v. *Askham*, 2 Vern. 26. *Trafford* v. *Ashton*, 1 P. Wms. 415. *Warburton* v. *Warburton*, 2 Vern. 420. *Green* v. *Belcher*, 1 Atk. 505.

(3) *Anon.* 1 Vern. 104. *Trafford* v. *Ashton*, 2 P. Wms. 415.

as a charge on the land, if such charge be not restrained to the annual profits; yet if no time for payment be appointed, a sale shall not be decreed. *Ivy* v. *Gilbert*, Pre. Ch. 583. 2 P. Wms. 13. *Evelyn* v. *Evelyn*, 2 P. Wms. 669. *Okedon* v. *Okedon*, 1 Atk. 550; nor will equity decree a sale of the lands, if any other mode is prescribed by the conveyance to satisfy the charge, as if it contain a power of leasing, or to mortgage the premises; *Ivy* v. *Gilbert*, 2 P. Wms. 13. *Mills* v. *Banks*, 3 P. Wms. 1; nor indeed will equity decree a sale in any case in which the rents and profits distinctly appear to have been exclusively intended to satisfy the charge; *Small* v. *Wing*, 3 Bro. P. C. 503. And so much do courts of equity in such cases respect the intention, that Lord Hardwicke held, that where a man creates a trust for payment of debts, and declares the trust of that term to be by perception of rents and profits, or by mortgaging to raise sufficient money for the payment of his debts, it restrains it merely to a payment out of rents and profits. But if it had been a trust of the rents and profits, the term might have been sold for the satisfaction of creditors." "But where there are other limiting words following rents and profits in a trust for payment of debts, his Lordship observed, that he did not remember any case which would authorize a sale." *Ridout* v. *E. of Plymouth*, 1 Atk. 104. and of the same opinion Lord Loughborough appears to have been, in *Lingard* v. *Earl of Derby*, 1 Bro. Ch. Rep.

311; his Lordship conceiving a devise for the payment of debts to be out of the statute. But in *Hughes* v. *Doulben*, 2 Bro. Ch. Rep. 614, Lord Thurlow, C. was of opinion, that in order to take a devise of real estate for payment of debts out of the statute against fraudulent devises, it must effectively provide for such purpose. This difference of opinion raises a very material question in the consideration of the nature of such an estate, with respect to assets; for if such devise be not within the statute, specialty creditors cannot pursue the estate as legal assets, which if it be within the statute they might do.

SECTION XIX.

LASTLY, there is a difference between testaments and deeds. For in testaments it is only one person who speaks, and his will ought to serve as a law, of which every part shall stand together, if it may (*p*); and therefore, if a man in the first part of

(*p*) "Touching the general rule to be observed for the true construction of wills, in testamentis plenius testatoris intentionem scrutamur. But yet this is to be observed with these two limitations: 1. His intent ought to be agreeable to the rules of law. 2. His intent ought to be collected out of the words of the will.

his will devise his land to J. S. and in the latter part to J. N. (1), they shall have a

(1) *Blamford* v. *Blamford*, 3 Buls. 105. per Dodderidge, J. *Anon.* 3 Leon. 11. c. 27. p. Dyer and Brown. *Wallop* v. *Darby*, Yelv. 209, 210. Cro. Eliz. 9. 10 Mod. 522. *Fane* v. *Fane*, 1 Vern. 30.

As to this, it may be demanded, how this shall be known? To this it must be thus answered: 1. To search out what was the scope of the will. 2. To make such a construction, so that all the words of the will may stand; for to add any thing to the words of the will, or in the construction made, to relinquish and leave out any of the words, is maledicta glossa. But every string ought to give its sound." Per Dodderidge, *Blamford* v. *Blamford*, 3 Buls. 103. See *Chapman* v. *Brown*, 3 Burr. 1634; where it is held that the court may imply an intention from what is said, but cannot from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omission. See also *Targus* v. *Puget*, *Robinson* v. *Robinson*, 2 Ves. 194, 225. *Coynton* v. *Halvin*, cited in *Lytton* v. *Lytton*, 4 Bro. Ch. 461. The courts of justice will transpose the words of a will to affect its intent, see *Brownsward* v. *Edwards*, 2 Ves. 248. Where the intent can be clearly collected, the law will dispense with those technical and formal words which would have been absolutely requisite to effectuate such intent by deed, as a devise to a man for ever, or to one and his assigns for ever, or to one in fee-simple, the devisee shall have an estate of inheritance; for the intention of the devisor is sufficiently plain, though he hath omitted the legal words of the inheritance. See *Widlake* v. *Harding*, Hob. 2. So by a devise, an estate-tail may be conveyed without words of procreation; Co. Litt. 9. b. 27. a. By a will also, an estate may arise by a mere implication; as where the devise is to the heir at law of

joint estate (*q*); or if in the latter part, he had devised a rent of it to J. N. this should

the devisor, after the death of the wife of the devisor, no estate is by express terms given to the wife, yet she shall have an estate for life by implication; but otherwise it would be upon such a devise to the younger son of the devisor; for there the eldest son and heir, and not the wife, should have the estate in the mean time; *Horton* v. *Horton*, Cro. Jac. 55. See also cases cited 1 Vent. 376. Cross remainders may also be implied from the limitations of a will, as where a devise is of Black Acre to *A.* and of White Acre to *B.* in tail, and if they both die without issue, then to *C.* in fee; *A.* and *B.* shall have cross remainders by implication; and on failure of either's issue, the other or his issue shall take the whole; *C.*'s remainder being postponed till failure of the issue of both, *Holmes* v. *Willett*, 1 Freem. 483. See also *Phipard* v. *Mansfield*, Cowp. 797. *Wright* v. *Lord Cadogan*, 2 Eden's R. 250, note (a), and cases there cited. And upon the indulgence afforded by courts both of law and equity to the real intention of the testator, is founded the doctrine of executory devises, by which certain limitations of a future estate or interest in lands or chattels are in the case of a will allowed to prevail, contrary to the rules of limitation in conveyances at common law. See Mr. Fearne's Essay on Con. Rem. and Executory Devises.

(*q*) Different opinions have been entertained respecting the effect and operation of repugnant clauses in a will. Lord Coke holds, that the latter clause shall control the first: for cum duo inter se pugnantia reperiuntur, in testamento, ultimum ratum est." Co. Litt. 112. b. And in *Carter* v. *Kingstead*, Owen, 84. Periam, J. held

have been construed first a devise of the rent to J. N. and afterwards of the land to J. S. charged with the rent (2). For a will is for the benefit of the testator, and at most implies only a consideration of love and affection, and therefore shall not be taken strongest against the testator, or most beneficial for the devisee, but equally. But a deed imports a consideration (3), and is for the advantage of the grantee alone; and therefore if there be any doubt in the sense, the words are to be taken most forcibly against the grantor (*r*), that he may not by

(2) *Paramour* v. *Yardley*, Plowd. 539. *Welden* v. *Elkington*, Plowd. 523. Lanc. 118.

(3) Plowd. 308.

that the repugnance of the clauses would render both void; whilst others maintain, (and the opinion is supported by the greatest number of authorities,) that the two devisees shall take in moieties as joint-tenants, or tenants in common, according to the words used in limiting the two estates. See margin, note (1). *Ridout* v. *Pain*, 3 Atk. 493. Mr. Hargrave's note (1), Co. Litt. 112. b. 113. a.

(*r*) Lord Bacon has illustrated this rule of construction, verba fortius accipiuntur contra proferentem, by a variety of cases, and observes, "that it is a rule drawn from the depth of reason, but the last to be resorted to, and never to be relied on but where all other rules of exposition of words fail; and if any other come in, this must give place." Maxims, reg. 3. This rule must also be understood subject to the distinction between an indenture and a deed-poll; the latter is executed

the obscure wording find means to evade it (4). And the grantor cannot, by any act of his, derogate from his grant, or contradict in the latter part what he had passed by the premises (5), for his act shall be construed most forcibly against himself. But the latter part may qualify and explain the premises (6), or enlarge them; for no word shall be rejected that may properly stand; but not abridge, or contradict, or control them (7); for this would be repugnant (*s*). But this is meant only of divided

(4) Sheppard's Touchstone, 87. 2 Black. Com. 380.

(5) *Cother* v. *Merrick*, Hard. 89, 94. Bridg. 101.

(6) *Thurnam* v. *Cooper*, Cro. Jac. 476, 477. 2 Roll's Abb. 66. pl. 9.

(7) *Altham's* case, 8 Rep. 154. Co. Litt. 299. a. 21. a.

by the grantor alone, and the words are his only, and shall therefore be taken most strictly against him; but in an indenture executed by both parties, they are to be considered as the words of both, and therefore not to be construed more strongly against the one, or more favourably for the other. *Brownrig* v. *Baston*, Plowd. 134. And even in the cases to which the rule is applicable, it must be so construed as not to work a wrong, ea est accipienda interpretatio quæ vitio caret; for, "it is a general rule, that when the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Litt. 42. a. b. 183. a.

(*s*) As to what clauses shall be deemed repugnant and what though restrictive shall prevail, see 2 Roll's Ab. 63. Co. Litt. 146. 2 Bac. Ab. 665. 14 Vin. Ab. Grants, 142.

clauses: for of one clause carried on with a connexion till the whole is finished, the law is otherwise (8). And indeed in one sentence it is in vain to imagine one part before another, since the mind of the author comprehends them at once.

(8) Co. Litt. 21. a. *Leigh* v. *Brace*, 5 Mod. 268.

SECTION XX.

And so much for the discovery of the meaning where the consent is declared by express signs. Yet sometimes it is sufficiently gathered from the nature and circumstances of the business itself. What we most commonly meet with of this kind is, that when some principal and leading contract has been entered upon by express agreement, some other tacit pact is included in it, or flows from it, as we cannot but apprehend upon considering the nature of the affair. It is upon this the principle of law is founded, that whenever the law, or the party giveth any thing, it giveth im-

plicitly whatever is necessary for the taking and enjoying of the same (*t*). But things appendant, appurtenant, or regardant, do not pass without the words cum pertinentiis (*u*); because they are not expressed nor implied by law in the grant. And there is no sort of covenant in which it is not understood, that the one party is bound to deal honestly and fairly by the other, and to do whatever equity may demand. As if

(*t*) Cuicunque aliquid conceditur, conceditur etiam et id, sine quo res ipsa non esse potuit; *Lyford*'s case, 11 Rep. 52. a. Therefore by the grant of a piece of ground, is granted a way to it; by grant of trees, is granted a power to cut them down, and to go over the land with carts to carry them away. So by a grant of mines, is granted a power to dig them; and by a grant of fish in a man's pond, is granted the right to come upon the banks and fish for them; but the grantee, in such case, cannot justify digging a trench to let the water out and take the fish, if he could take them by nets or other means; Finch's Law, 63. Sheppard's Touchstone, 89.

(*u*) This opinion seems formerly to have prevailed, Br. Grant, pl. 87. *Higgins* v. *Grant*, Cro. Eliz. 18: but Lord Coke holds, that by the grant of a manor, without saying cum pertinentiis, things regardant and appendant will pass as incidents; Co. Litt. 307. a. And the authorities stated in 2 Bacon's Ab. 699; Sheppard's Touchstone, 89; 14 Vin. Ab. 118, seems to furnish a conclusive authority to such opinion.

the price be omitted, it is to be estimated at the common rates (*v*). So the time of payment or delivery being added in favour of him who is obliged (1), he is bound to do it, or pay, immediately (2), unless it requires a necessary delay. So if the place be omitted, it shall be delivered at the place where it happens to be at the time (*x*). In the same manner most covenants leave some slight exceptions and conditions to be understood; (but in all these it is strictly required, that not so much as one probable conjecture appear to the contrary, tale oportet sit quod pro natur actus credi debeat exceptum;) for otherwise it would be easy to thrust a troublesome obligation upon a man against his will: yet were too great a

(1) Domat. B. 1 ti. 1. s. 3. 5.
(2) Moore, 472. Dyer 30. pl. 203. Co. Litt. 208. a. Bridgeman, 20. 16 Vin. Ab. 267. *Lanford* v. *Tyler*, 6 Mod. 162. Sheppard's Touchstone, 136, 377.

(*v*) This case falls within the second class of implied contracts enumerated by Sir William Blackstone, "which class extends to all presumptive undertakings or assumpsits, which, though perhaps never actually made, yet constantly arise from this general implication and intendment of courts of judicature, that every man hath engaged to perform what his duty or justice requires." See 3 Com. 161.

(*x*) As to the time when, and place where, conditions are to be performed, there being no time or place limited by the deed or agreement, see 5 Vin. Ab. Condition, 189. Sheppard's Touchstone, 136, 377.

licence given to these secret and implied reserves, there is scarce any covenant which might not be either annulled or evaded by them.

END OF THE FIRST VOLUME.

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